

No. ~~2091~~

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS EVANS,
Plaintiff in Error,
VS.
SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States Circuit (now District)
Court for the District of Oregon.

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STATEMENT OF THE CASE.

This is a writ of error directed to the Circuit (now District) Court of the United States, for the District of Oregon, and is brought to reverse a judgment of the trial court directing the jury to return a verdict in favor of the defendant, in an action to recover \$10,000.00 damages for the loss of a leg, sustained by the plaintiff, a young man twenty-two years old, by coming in contact with one of defendant's trains while the same was being

backed from a flag station named Wilsonia to the town of Oswego, Clackamas County, State of Oregon, about nine miles south of the City of Portland, on the west bank of the Willamette River. The track on which the accident occurred parallels the Willamette River from Portland to Oswego, a small town of about three hundred inhabitants. Wilsonia, at the time of the accident, September 25th, 1909, was a flag station about thirteen hundred feet north of Oswego, and consisted of a platform with the name above, and was installed by the defendant for and used by a few families residing west of the track and on a range of hills paralleling the tracks and overlooking the river. There was and is a county road west of and between the tracks and this range of hills, which road extended past Wilsonia to Oswego and paralleled the railroad tracks. On the east of the tracks there was and is a gradual slope towards the Willamette River and on the low land adjoining the river, about half way between Oswego and Wilsonia, was and is situated the foundry of the Oswego Iron Works, which, at the time, was not in operation. This foundry was about four hundred feet east of the tracks and three or four foot-paths lead up from the same to and across the tracks between Wilsonia and Oswego. These paths were used primarily by the employes of the Oswego Iron Works in going to and returning from their work. These employes resided mainly in Oswego and those portions of Oswego called Old and New Town, which were

south and west of Wilsonia. One of the foot-paths leads up towards the station of Wilsonia.

On the evening of September 25th, 1909, plaintiff bought a ticket entitling him to passage over defendant's line from Portland to Oswego and return, and came to Oswego to visit some friends and went coon hunting with them in the evening, intending to return to Portland from Oswego on the train leaving there at 10:45 the same evening. At about train time plaintiff was with his friend Emmett, (a witness in the case) at a barn down near the foundry of the Oswego Iron Works. Not having a watch, but realizing that it was about train time, plaintiff, with his friend Emmett, started up one of these paths towards Oswego. After starting they heard a train switching at Wilsonia and saw the side lights and imagined it was getting ready to leave for Portland, and without any lantern, they ran up the hill along one of these paths and came on to the right of way of the defendant about six hundred feet south of Wilsonia. On reaching the tracks they were out of breath but hurried as fast as they could down the right of way between the rails towards Wilsonia to catch the train, plaintiff being in the lead. They had gone three hundred fifty or three hundred and seventy feet in that direction when the train, which was backing up towards Oswego, ran into plaintiff while between the rails and crushed one of his legs so that amputation was necessary.

Plaintiff in his complaint alleged that in order

to return to Portland he found it *convenient* to catch the train at Wilsonia by taking an open and commonly used trail up to defendant's tracks at a point———feet south of Wilsonia, and thence along the track to Wilsonia. That while approaching defendant's tracks, he *could and did see the side lights of defendant's train* standing at Wilsonia, headed towards Portland, and apparently ready to depart therefor. That said pathway was continuously used by the public, and *particularly by persons desiring to take defendant's train at Wilsonia*, and that said use was known to and permitted by defendant, and that the public was invited to travel over said route. That defendant, without the usual or any light or signal on the rear end of said train, or without ringing the bell or sounding a whistle or signal of warning or notice, backed said train into plaintiff, crushing one of his lower limbs. It will thus be seen that plaintiff claimed to be a licensee, and that being so, defendant was bound to operate its trains in anticipation of his probable presence on the track at ten o'clock at night, and that defendant was negligent in this duty in backing its train towards Oswego without any light on the rear end or without any notice or warning.

Defendant filed an answer denying the material allegations of the complaint and setting up as an affirmative defense that plaintiff was a trespasser on the tracks and was guilty of contributory negligence in running along between the rails in an effort to catch the train. A reply denying this

affirmative matter was filed, and at the trial, after both parties had rested, upon motion of defendant, the trial court directed the jury to return a verdict in favor of defendant, on the ground that the evidence showed conclusively that plaintiff was guilty of contributory negligence, causing the injury. This ruling of the trial court is assigned as error. The following three questions arose at the trial, and are discussed in plaintiff's brief.

(1) Was plaintiff a trespasser or a licensee, and what was the duty owing plaintiff by defendant?

(2) Was defendant negligent in operating its train with respect to its duty, if any, owing to plaintiff?

(3) Was plaintiff guilty of contributory negligence as a matter of law.

Although the third question is the only one properly before this court, and the one which is determinative of this case, in view of plaintiff's brief, we deem it advisable to briefly discuss the first two points.

POINTS AND AUTHORITIES OF DEFENDANT IN ERROR.

WAS PLAINTIFF A TRESPASSER OR LICENSEE?

(1) Plaintiff in going on to defendant's tracks and hurrying north to Wilsonia between the rails at ten o'clock at night, was a trespasser, and defendant owed him no duty other than not to willfully or wantonly injure him after having discovered him in that position.

Texas & Pacific Ry. Co. v. Modawell, 5th Circuit, 151 Fed. 421, 426.

Southern Railway v. Fiske, 8th Circuit, 159 Fed. 373, 377.

C & O Ry. Co. v. Hawkins, 4th Circuit, 174 Fed. 597, 599.

(a) To establish a use of a railroad track by implication or by invitation, the proof must be clear, convincing and positive, and the mere fact that a use is established in the daytime does not necessarily imply a use at night.

White Personal Injuries on Railroads, vol. 2, sec. 1064.

Eppstein v. Missouri Pacific Ry. Co., 197 Mo. 730, 734.

Frye v. St. Louis etc. Ry. Co., 200 Mo. 377, 401, 405.

WAS DEFENDANT NEGLIGENT?

(2) Assuming plaintiff was a licensee, defendant did everything that reasonably could be required

of it to anticipate the probable presence of plaintiff on the track between stations at ten o'clock at night.

N. P. Ry. Co. v. Jones, 9th Circuit, 144 Fed. 47, 49, and cases cited.

Garner v. Trumbull, 94 Fed. 321, 322.

N. P. Ry. Co. v. Curtz, 9th Circuit, 196 Fed. 367, 369.

WAS PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE, AS A MATTER OF LAW?

(3) A railroad track is notice of danger and imposes upon the traveller or person using it, whether he be a licensee, or trespasser, the duty of exercising the highest degree of care. In other words,—he takes the risk subject to its concomitant perils.

N. P. Ry. Co. v. Jones, 9th Circuit, 144 Fed. 47, 50.

Rich v. Chicago, etc. Ry. Co., 148 Fed. 79, 85.

Garlick v. N. P. Ry. Co., 131 Fed. 837, 839.

Elliott v. Chicago etc. Ry. Co. 151 U. S. 245, 248.

(4) It is the duty of one approaching a railroad track, or one using it, to look and listen for the approach of trains, and to ascertain his position and the surrounding circumstances, and a failure to exercise the degree of care required under the circumstances, is negligence.

White Personal Injuries on Railroads, vol. 2, sec. 1092.

Blount v. Grand Trunk Ry. Co., 61 Fed. 375,
379

Pennsylvania etc. Ry. Co. v. Peebles, 67 Fed.
591, 593

Gilbert v. Erie Ry. Co., 97 Fed. 747, 750

Neininger v. Coran, 101 Fed. 787, 791

Railroad Co. v. Houston, 95 U. S. 697, 702

Schofield v. Chicago, etc. Ry. Co., 114 U. S.
615, 618

N. P. Ry. Co. v. Freeman, 174 U. S. 379, 382.

(5) Even if defendant was negligent in not providing lights, or in not giving sufficient warning, plaintiff is not relieved of the obligation imposed by law to take ordinary precaution for his own safety, and if guilty of contributory negligence, he cannot recover.

N. P. Ry. Co. v. Jones, 144 Fed. 47, 49 and
cases cited. (9th Circuit)

Rich v. Chicago, etc. Ry. Co., 149 Fed. 79,
84.

Railroad Co. v. Houston, 95 U. S. 697, 702

N. P. Ry. Co. v. Freeman, 174 U. S. 379, 383.

(6) Where the facts, or the fair inferences to be drawn from the facts with respect to contributory negligence, are doubtful, the case is one for the jury, but where, as in this case, from any proper view of the undisputed or established facts, the conclusion necessarily follows, as a matter of law, that the plaintiff cannot recover, it is the duty of the trial court to direct a verdict. In other words,—if the trial court, in the exercise of a sound, judicial

discretion, would be compelled to set aside the verdict, a directed verdict should be granted.

- N. P. Ry. Co. v. Jones, 9th Circuit, 144 Fed. 47, 52, and cases cited.
- Russell v. Oregon Short Line, 9th Circuit, 155 Fed. 22, 25.
- Morgan v. N. P. Ry. Co., 9th Cir., 196 Fed. 449, 453
- Tucker v. B & O R. Co., 59 Fed. 968
- Kirtley v. Chicago, etc. Ry. Co., 65 Fed. 386, 392
- McCann v. Chicago, etc. Ry. Co., 7th Circuit, 105 Fed. 480, 483
- Work v. Chicago, etc. Ry. Co., 7th Circuit, 105 Fed. 874, 878
- Mobile etc. Ry. Co. v. Cverver, 7th Circuit, 112 Fed. 489, 493, 494
- Dunworth v. Grand Trunk Ry. Co., 7th Circuit, 127 Fed. 307, 308
- Garlich v. N. P. Ry. Co., 8th Circuit, 131 Fed. 837
- Rich v. Chicago, etc. Ry. Co., 8th Circuit, 149 Fed. 79, 84
- D & H R Co. v. Wilkins, 2nd Circuit, 153 Fed. 845, 848.
- Ellis v. Southern Ry., 8th Circuit, 163 Fed. 686, 689
- Hart v. N. P. Ry. Co., 8th Circuit, 196 Fed. 180, 185, 187
- Schofield v. Chicago, etc. Ry. Co., 114 U. S. 615, 618
- Gunther v. Liverpool, etc. Ins. Co., 134 U. S. 110, 116
- Deleware etc. R. Co. v. Converse, 139 U. S. 469, 472

- Elliott v. Chicago, etc. Ry. Co., 150 U. S.
245, 246
- S. P. Co. v. Pool, 160 U. S. 438
- Texas etc. Ry. Co. v. Gentry, 163 U. S. 353,
366, 440
- N. P. Ry. Co. v. Freeman, 174 U. S. 379,
383
- District of Columbia v. Moulton, 182 U. S.
576, 579
- Marande v. Texas etc. Ry. Co., 184 U. S.
173, 191

ARGUMENT.

Plaintiff has attempted to show that he had been invited by the defendant to use the space between the rails as a foot-path from a point about six hundred feet south of Wilsonia down to the station. It is a well settled rule of law that a railroad company owes no duty to a trespasser on a railroad track except not to willfully or wantonly injure him after discovering his peril. (See authorities under point 1.)

The question of being able to avoid the injury after discovering plaintiff on the track, does not appear in this case, nor is it raised by the pleadings, the failure to warn and notify the plaintiff that the train was backing up being the only charge of negligence against the defendant. Neither is it claimed that defendant willfully or wantonly injured plaintiff. Before plaintiff can recover on his theory of the case, he must therefore establish that he was a licensee in the use of the space between

the rails, between the point where the path crosses the track and Wilsonia, and that defendant neglected its duties in that respect towards him.

It is well settled in both state and federal courts that before the use of a private right of way for railroad purposes, such as the defendant's, can be said to be used by the public by implication, license or invitation, that use must be proven by clear, satisfactory and convincing testimony. Reference to the case of *Frye v. St. Louis Ry. Co.*, 200 Mo. 377, is sufficient to establish this point. Mere silence or non-interference by a railroad company in the use by the public of its tracks, will not imply a license to use them.

See *Gretchen v. Chicago, etc. Ry. Co.*, 22 Fed. 609, and cases cited in foot-note in 2nd Amer. & Eng. Ann. Cases, 550. See also *Ward v. S. P. Co.*, 25 Ore. 433, 437. And as stated in Vol. 2, *White on Personal Injuries on Railroads*, Section 873,

“A license to walk on a railroad track cannot be established by proof showing that the place was remote from any station, and that persons living near it had been in the habit of walking on the same; that the railroad company's employees had seen persons walking on it and that no steps had been taken to prevent such user, as this only amounts to a mere passive acquiescence in the use of the track and does not show any invitation, either express or implied to so use it, on the part of the railroad company.”

This proposition is ably discussed in the case of Cleveland, etc. Ry. Co. v. Tartt, 64 Fed. 823, where the court, speaking through Judge Baker, at page 826 said:

“The decedent, accompanied by his son, was, when killed, walking on or dangerously near to the track of the company. He was not on or near any high way or street crossing. He was traveling along the right of way for his own convenience, without any invitation, express or implied, and with knowledge of the danger to life and limb from passing trains. It is true that he was killed while attempting to rescue his son from impending peril, but he had, by his own voluntary act, brought his son into a situation of danger, which gave rise to the peril. The only excuse offered for such conduct was that the defendant had suffered other people to travel along its right of way without interference or objection. He was traveling upon the defendant’s right of way, not for any purpose of business connected with the railroad, but for his own convenience, as a footway, in reaching the village of Venice. The right of way was the exclusive property of the defendant, upon which no unauthorized person had the right to be for any purpose. It was a place of known danger, and there was nothing to exempt the decedent from the character of a wrongdoer and trespasser in traveling along the right of way further than the implied consent of the defendant arising from its failure to interfere with the previous like practice by others. But because the defendant did not

enforce its rights, and warn people off its premises, no right was thereby acquired to use its roadbed as a place for public travel. At most, it was used by sufferance, which amounted to no more than a mere naked license, and imposed no obligation on the part of the owner to provide against the danger of accident. The person who used the right of way for his convenience went there at his own risk, and enjoyed the implied license with its attendant perils. *Elevator Co. v. Lippert*, 18 U. S. App. —, 11 C. C. A. —, 63 Fed. 942. The decedent, then, stood in no more favorable position than that of a wrongdoer, or trespasser. He was at the time of the accident in the exercise of no legal right, and at most was in the enjoyment of a naked license implied from the previous use of the right of way by others; and the rights and obligations of the decedent and the company are to be measured as in the case of parties thus situated. Where both parties are equally in the position of right which is enjoyed by each independently of the other, the plaintiff is only bound to show that the injury was occasioned by the negligence of the defendant, and that he exercised ordinary care to avoid it. But where the plaintiff is a wrongdoer or trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was willfully inflicted, or that it was caused by

negligence so gross as to authorize the inference of willfulness.”

Plaintiff testified and also alleged in his complaint that he used the track as a matter of *convenience*. In paragraph 872, White, in his work on Personal Injuries on Railroads, Vol. 2, distinguishes as follows between a mere licensee and an invitee:

“The legal distinction which exists between the obligation which is due by the owner of premises, to a mere licensee, who enters thereon, without any enticement or inducement, and the duty owing to one who enters upon lawful business, by the invitation, express or implied, of the proprietor, is well settled by the cases and the established principles of the law. The former enters at his own risk; the latter has a right to believe that, taking reasonable care of himself, all reasonable care has been used by the owner to protect him, in order that no injury may occur.”

And in paragraph 870, Vol. 2, the same author says:

“In the absence of some relation which enures to the mutual benefit of the owner of the premises and the injured person, or to the former alone, there is generally held to be no implied invitation on the part of the owner.”

In this case it is true plaintiff intended to catch the train at Wilsonia, but it is equally true, and it is admitted, that he originally intended to take the train at Oswego, but as a

matter of *convenience* to himself, took the path and the track to Wilsonia. Clearly, no invitation was held out to him to so use this track.

It is also well settled that although continued use of a company's tracks with the knowledge and acquiescence of the company will create a license to use the tracks in the day time, it will not necessarily create a license or invitation to use the tracks at night. It is sufficient to call the court's attention to the case of *Frye v. St. Louis etc. Ry. Co.*, 200 Mo. 377, where the court in discussing this proposition, at pages 401, 405, said:

"In this case, if it be conceded, *arguendo*, the use of the track was so open, so continuous and so pronounced that knowledge of the daytime use would be inferred, yet it must be apparent no such use was established for the nighttime. Plaintiff's learned attorneys sought to establish the night use, but their evidence fell short of proving a case to go to the jury on that issue. The night use of this track by pedestrians was confined to two classes; first, the class to which plaintiff belonged, to-wit, the mill men living at Mill Springs and working at Leeper, some eight or ten in number; and the utmost the evidence tends to show is that when the days were short and the nights long these men used this track after dark to come and go, as plaintiff did."

"We are pointed to no case going as far as plaintiff insists we should go in order to sustain this judgment; and, confining our conclusion on this branch of the case to the precise facts

of the record, that conclusion is that at the place Mr. Frye was struck by defendant's engine, and at the time, to-wit, in the night-time, it was a place and a time where defendant not only had the right, but it was entitled, to expect a clear track. Hence, it was a place defendant owed plaintiff no duty to look out for him; and, hence, in order to recover, plaintiff must show that he was actually seen by the engineer in time to have warned him and thus avoided his injury. (Rine v. Railroad, 88 Mo. 392; Barker v. Railroad, 98 Mo. 50; Sinclair v. Railroad, 133 Mo. 233; Reyburn v. Railroad, 187 Mo. 565.)"

The testimony introduced to show an invitation to use the space between the rails may be summed up as follows: The greater portion was to the effect that the workmen of the Oswego Iron Works used the paths from the foundry leading up to the tracks, then across and up the hill to Oswego and Old and New Town. There is considerable testimony also that people walked the tracks as a matter of convenience from a point six hundred feet south of Wilsonia to Oswego. There is some testimony tending to show an intermittent use in the day time from Wilsonia south towards Oswego, and that the defendant never tried to stop such use. There is practically no testimony showing a use at night, that of plaintiff's witness, Roy Fox, being the only testimony introduced by plaintiff during the trial, which testimony is as follows: Transcript, page 173.

Q. Have you seen people traveling night and day?

A. Yes, sir.

Q. All times of day and night?

A. Yes, sir. I have traveled it myself.

Defendant's witnesses H. M. Mooney, transcript, page 280; F. S. Craw, transcript, page 292, and L. D. Keyzer, transcript, page 328, testified they had scarcely ever seen the track used at night.

It seems so apparent from reading the testimony that plaintiff at ten o'clock at night, in using this space between the rails, was a trespasser. The testimony clearly falls short of that required to establish an invitation to so use the tracks, and this case clearly falls within the doctrine laid down in *Eppstein v. Mo. Pac.*, 197 Mo. 720, where the court, at page 734, said:

“In a given case there might be such scant or neutral evidence of public user of a portion of a track—mere sporadic instances thereof—that a court, as a matter of law, would determine that the servants of a railroad company charged with the running of a locomotive engine, had no duty to look and see. In such case, unless they did see the dangerous exposure of a person on the track, and in time to avert injuring him by the use of ordinary care, the court would take the case from the jury.”

It is respectfully submitted that there is no testimony in the record tending in any way to show an invitation to plaintiff or any other person to use

this space between the rails at ten o'clock at night *for the purpose of taking trains at Wilsonia, as alleged in plaintiff's complaint.*

One is inevitably brought to this conclusion when it is considered and not disputed that Oswego was, at the time of the accident, and is now a small town thirteen hundred feet or more south of Wilsonia, and that very few people lived on the hills in the space between Oswego and Wilsonia. That Wilsonia was and is a mere flag station with only a platform, and used by not over one hundred and fifty people, with no homes around it, and the closest being about eight hundred feet west across the county road and up on the range of hills. That the tracks were a private right of way not in a platted portion of a town site and one hundred feet or more from the county road, with a dangerous bridge a short ways north of Wilsonia where people had been forbidden by the railroad company from trespassing. As it is not contended that defendant discovered plaintiff on the track in time to have avoided injuring him, plaintiff cannot under any view of the law and evidence in this case, recover from the company, because there is no evidence of willful or wanton injury and because that contention does not arise under the pleadings.

WAS DEFENDANT NEGLIGENT?

If plaintiff was a trespasser he clearly cannot recover under the authorities cited in point 1. Assuming, however, for the sake of argument, that plaintiff was an invitee, the rule of law is clear and undisputed that the defendant is only bound to use reasonable care to avoid injuring him. That defendant in operating its train on the night of the accident exercised reasonable care, clearly and unmistakably appears from the following testimony. In fact, the testimony introduced by plaintiff to show negligence on the part of the defendant only strengthens and tends to corroborate defendant's version of the accident. It must be remembered that the only negligence charged is the failure to have a light on the rear end of the train while backing, or some other satisfactory warning given plaintiff. Plaintiff saw the lights of the cars and knew the train was at Wilsonia. Defendant's relation towards plaintiff was not that of an insurer.

N. P. Ry. Co. v. Jones, 144 Fed. 47.

At most, if plaintiff was an invitee, defendant only owed him the duty of exercising reasonable care, under the circumstances, not to injure him at a place on the track where it might reasonably anticipate he would be. In the exercise of this duty it had the right to expect plaintiff to exercise reasonable care and diligence to avoid being injured. As stated in N. P. Ry. Co. v. Jones, Ninth Circuit, 144 Fed. 47, and D & H R. Co. v. Wilkins, 153 Fed.

845, 847, and cases cited, "as against a bare licensee or invitee, a railroad company has a right to run its trains in the usual manner without special precautions, if the circumstances do not themselves give warning of his probable presence, and he is not seen until it is too late."

Thomas J. Evans, plaintiff, testified as follows:
Transcript, page 29.

Q. Mr. Evans, what kind of a night was it?

A. Well, it was rather dark.

Q. Was it raining?

A. No, sir.

Q. Cloudy?

A. Yes, it was cloudy and dark.

Q. What was the date of that?

A. The 25th of September.

Q. At about what hour?

A. I don't know the exact time but it was along about 10:45.

Q. In the evening?

A. Yes, sir.

Q. What amount of noise, if anything, was that train making? Did you hear anything?

A. Never heard a thing.

Q. What was the country there? Was it level or hilly?

A. Why, it was practically level.

Q. What was the road bed as to being level or otherwise?

A. It was level.

Transcript, page 31.

Q. Now, state was there anybody on the rear end of that train when you were struck?

A. No, sir.

Q. Was there any light there or anything?

A. Nothing at all.

Q. Well, were you looking and listening?

A. Yes, sir, I was looking straight ahead.

On cross examination he testified as follows:

Transcript, pages 51 and 52.

Q. You didn't hear the conductor or anybody else call from the train to look out for it?

A. No, sir, I did not.

Q. You didn't see it coming back?

A. No, sir, I did not.

Q. And yet you are willing to swear to this jury that you looked, you didn't see any brakeman or anybody else on the rear of that train, or any light there?

A. It was none there.

Q. How do you know, if you couldn't see the train and didn't see it?

A. Well, because it just knocked me off the side.

Q. I know, but if you looked and couldn't hear it, and didn't know it was there, how could you say whether there was a brakeman or a light on the rear of that train?

A. There was no light there or a man could see it.

Q. You said there was no conductor, no brakeman, or no man there.

A. I couldn't say there was any there—never seen any.

Q. You say there was no one there, but you mean to say you didn't see anybody?

A. I didn't see nothing at all.

Q. As a matter of fact, did you look?

A. Yes, I had my head up like any man would.

PETER JAMES EMMETT, plaintiff's witness, and companion of plaintiff on the track, testified as follows after describing how they heard the train switching at Wilsonia:

Transcript, pages 71 to 74.

Q. Well now sir, what was the first thing you noticed?

A. The first thing I noticed?

Q. Yes, in regard to the train after you had got on the track?

A. When I got on the track?

Q. After you got on the track.

A. After I got on the track?

Q. Yes, when he was struck.

A. When he was struck. There was a man came to the door with a lantern just as the train struck him, and hallooed "Look out, look out."

Q. Just as the train struck him?

A. Just as the train struck him.

Q. Where did this man come from?

A. Just came right out of the coach.

Q. Out of what part of the coach?

A. The rear end, right out of the door.

Q. The end you mean, towards you?

A. Yes, sir.

Q. Towards Evans? Well now, which happened first—did the train strike Evans first, or did the man come out of the coach first?

A. There wasn't but very little difference. You could hardly tell.

Q. Just tell the jury what you saw about that just as near as you can.

A. Well, just about the time the train struck the boy, the man come to the door with a lantern, and he hallooed "Look out," and it just knocked the boy down, and it ran over his leg. And I crawled down to see where he went to. I never expected to see him alive.

JUROR: How far were you from the train then?

A. About eight or ten feet.

Q. Do you know who that was that had the lantern?

A. Well, I suppose it was the conductor.

Q. Did you see anything of the brakeman?

A. No, sir.

Q. Well now, up to the time that that man came out of the rear door with the lantern, up to that time was there any light on the rear of the train?

A. No, sir.

Q. You swear to it?

A. There was no light.

Q. Was there any other look-out?

A. All the light you could see was what was shining through the glass. We would have to look up to see the light shining through the glass of the door.

MR. FENTON: Through what?

A. He would have to look up to see the light shining through the glass of the door.

MR. FENTON: Through the panel of the door?

A. Yes, sir.

Q. You saw that afterwards, did you?

A. Just as the door opened I could see, when the train was coming, and it didn't any more than give me time to get off.

Q. Were you looking all the time as you were coming down there to see if there was any train coming, or in the way?

A. I don't know as I would have seen it if the door hadn't opened, myself.

Q. Was it pretty dark?

A. Fairly dark, yes.

Q. Now, was there any whistle or any bell rung there right before the accident?

A. Well, I didn't hear any myself.

Q. Well, were you in a position where you would have heard if it had been sounded?

A. I expect I would.

Q. Was there any signal of any kind given so as to warn Evans or yourself of the backing of that train?

A. Not that I know of.

Q. Any noise of the train running, or anything that you could hear?

A. Of course the train would make a little noise.

Q. Did you hear any noise?

A. I wasn't paying any attention to the noise

particularly. I was expecting it was going the other way, and would start from Wilsonia.

Q. Was the wind blowing, do you know, that night?

A. No, I don't know.

Q. You say you and Evans had been running pretty fast?

A. Yes, sir.

Transcript, page 75.

Q. About the length of one coach? And what stopped the train, do you know?

A. Well, the man that come to the door pulled the string just after it struck him.

Q. What?

A. The man who came to the door pulled the string.

Q. Did you see that man around there afterwards that pulled the string?

A. He certainly was there some place.

Q. Are you satisfied who it was?

A. Well, pretty, yes.

Q. Do you know him?

A. Well, I suppose I do.

Q. Who was he?

A. I think it was Mr. Keyzer that come to the door.

Q. That would be the conductor on the train at that time?

A. Yes.

On cross examination he testified as follows:

Transcript, pages 90 to 92.

Q. And you didn't catch him?

A. I was just a little ways behind him.

Q. He kept ahead of you about 10 feet?

A. About 10 feet.

Q. Did you notice the train backing up at all before he was struck?

A. Not until he was struck.

Q. Just before he was struck you noticed the train was coming?

A. Just about the time it struck him.

Q. How far away from you was it when you first saw the train approaching?

A. About 10 feet.

Q. You mean you were 10 feet from the rear end?

A. From the rear end.

Q. Don't you think you were 20 or 25 feet away?

A. I don't think it was.

Q. Are you certain about that?

A. I know I was not so very far.

Q. Well, weren't you as much as 20 or 25 feet away when you first saw the train coming? I mean, knew it was coming?

A. No, sir, I don't think I was.

Q. Did you call to him to get out of the way?

A. Just about the time it struck him, I called to him.

Q. What did you say?

A. I says: "Look out."

Q. Whom did you speak to?

A. Tom Evans.

Q. What did you call him?

A. I says: "Look out, Tom."

Q. Did you yell.

A. I halloood just about as I said it.

Q. You said, "Look out, Tom."

A. Yes, sir.

Q. Did you say it that way.

A. I suppose I did.

Q. You thought he was going to be run over, didn't you?

A. Just as the door opened there when I saw it was coming.

Q. When you called to him, you thought he was going to be run over any way, didn't you?

A. Sure, or I wouldn't have halloood.

Q. Then you said: "Look out, Tom?"

A. Yes.

Q. That is the way you said it? Now, didn't you shout to Evans and say: "Look out?"

A. I told him to look out.

Q. And just as you shouted the man appeared at the door?

A. Yes, sir.

Q. With a lantern?

A. And we both halloood at about the same time.

Q. That is the man on the car yelled about the same time that you did?

A. Yes, sir.

Q. And notwithstanding that, he was struck. That is all.

CHARLES HOWARD ELSTON, plaintiff's witness, testified as follows:

Transcript, pages 101 to 106.

A. Well, we pulled into Wilsonia without any unusual delays at any of the stops along the line, and we got in there, I suppose, on time. I didn't look at my watch, but would judge that we did. And they stopped there some little time, quite a bit,—long enough, at least, that I got up and went out onto the platform between the two coaches to see what caused the delay. And I saw the conductor working the new switch that they had just placed that day. He was working it backward and forwards, to get it in working order so it would work easy to make the flying switch. And he worked there some little time after I went out on the platform, and finally got it working to suit him. They made the fly and run in ahead and coupled on, and was backing up to Oswego, and the conductor came through between the two coaches. I just stayed on the platform—it is only a little ways from Wilsonia to Oswego—and just before the train started, the conductor came through with his lantern. And after the train was in motion, a brakeman came through with what they call markers, or rear lights, supposed to be on the coach. And we had run just a little ways when they gave two bells to stop. Well, I went up the steps on the platform, and through the front coach, in back and up to the front platform, and the brakeman was just about the door, and I went past, and the conductor was stand-

ing on the platform. I followed the conductor down. I first asked him, I says, "Is somebody struck." And he says, "Yes." He walked right down the steps on the side that the boy was thrown off of, and I followed right behind him. And we went back down the track some little distance, and in walking along I got ahead of him. And I got down to the boy just ahead of him. He was right behind me, though. And found the boy laying there. And I examined him to see what shape he was in, and found the condition of his leg. It was cut off just below the knee, just a little ways, and ground up clear down to, or about the ankle joint—all mangled. And of course the first thing I thought of was to give aid to the boy.

Q. Was the boy a stranger to you?

A. He was, yes.

Q. At that time?

A. That was the first time I ever saw him that I know of. I asked some of the boys if they had anything to bind up the limb with. Nobody had anything. I started to take off my coat when the engineer, Mr. Craw, said that he would get a bell cord—a piece of the bell cord—if I remember right. I think it was him. At least they brought the cord, and I bound up the limb just above the knee as tight as I could, and stayed with the boy till he got to the hospital. In fact, I was with him from that time on till the operation was over and he was wheeled into the ward.

Q. Now, sir, you heard the signal to stop, did you?

A. I did.

Q. What was that? What kind of a signal?

A. Two bells.

Q. You heard that distinctly?

A. Yes, sir.

Q. And you knew something had happened then?

A. Yes, sir.

Q. Now, can you tell the jury, can you say positively, where that brakeman was at that time?

A. All I know is this: The brakeman passed through between the two coaches after the train was in motion, and just before it struck the boy; but a very little bit before, as I remember it.

Q. Now, you were between these two coaches?

A. I was between the two coaches. I was standing on the platform of what was the rear coach in going out from Portland.

Q. Let us get that. Now, we will say the engine was here. This is the front coach, and this is the rear one, backing this way. You were in here on the rear platform of this first coach back of the engine?

A. I was after they made the flying switch, and the engine run in on the main line and coupled on, I was on the front platform of the coach connecting with the engine.

Q. And the train was backing?

A. Yes, sir.

MR. FENTON: The front platform?

MR. LATOURETTE: This is the engine here, and this is what he calls the rear coach here. Now, they were backing up towards Oswego?

A. Yes, sir.

Q. And you were on the rear platform of this coach next the engine?

A. I was on the platform of the coach next the engine, standing on the lower step.

Q. As they were backing?

A. Yes.

Q. Now, the engineer passed by you with his two lanterns?

A. The brakeman.

Q. The brakeman, yes.

A. Yes.

Q. And you saw him go into this car?

A. I did.

Q. And you say shortly afterward that you heard this signal to stop?

A. Yes.

Q. Now, how far could that brakeman have got inside of that car?

A. Well, he couldn't have got, I don't think further than the center of the car.

Q. Further than the center of the car?

A. He couldn't have been further than that, I don't think, while I didn't see.

Q. When you went in after you heard that signal, you went into this coach through the door, and you saw the brakeman inside, didn't you?

A. Yes, sir.

Q. He hadn't got outside?

A. He was just at the other door, just about the other door, possible right by the stove.

Q. He hadn't got out of the car?

A. No, sir.

Q. Until after the signal to stop was given?

MR. FENTON: I want his answer there.

A. Well, of course, what I meant was this. When I got through the car, there was where the brakeman was. I don't say that he hadn't been on the platform, because I wasn't there to see; but when I went through the car, he was standing just about the door.

Q. You say that when he went into the car he wouldn't have had time to have got more than the center of the car, you think, before the signal was given?

A. No, I don't think he could have got more than to the center of the car.

Q. He couldn't have got out to the rear end?

A. No.

Transcript, pages 107 to 108.

Q. You heard that signal to stop plainly?

A. I did.

Q. Did you hear any bell rung in the engine?

A. Well, sir, that I couldn't say. I don't remember of hearing any bell at all. There was nothing that I remember of.

Q. Did you hear any whistle blown?

A. I did not.

Q. Were you in a position where you would have been likely to have heard a bell or a whistle?

A. I was in a position to have heard it, but at the same time I would not probably have noticed it, not thinking anything at all.

Q. Do you know whether they had any automatic bell or not on the train?

A. Automatic bell? I couldn't say whether there was on that engine or not. I couldn't say. I know they had one on one of the engines at Jefferson Street, but whether it was on that engine, I could not say. I don't know which engine it was on.

On cross examination he testified as follows:

Transcript, pages 116 to 118.

Q. But that coach was lighted up, was it?

A. Yes.

Q. Both coaches were lighted up?

A. Both coaches were lit up.

Q. And they had the usual glass windows on each side?

A. Yes, sir.

Q. Do you remember the door here whether it had a glass in the rear?

A. It did.

Q. And when you got through there the conductor, as you recollect it, was either in the door, or had just stepped through?

A. The conductor was standing on the platform just out of the door to the left.

Q. Oh, outside?

A. Just outside, to the left.

Q. Outside. Well, now, how was his back with reference to that door? The door is in the center, isn't it?

A. Yes.

Q. Do you remember how he stood there?

A. Well, sir, I do not.

Q. Was he facing towards the east or facing toward Oswego, or could you tell?

A. If I remember right, I think he was facing the east, but I could not say.

Q. That would be the direction where the boy was?

A. Yes.

Q. Well, now, when you went out there, had the boy already gone under the wheels, or had he just struck?

A. Why, the boy was struck before—I suppose the boy was struck before I left the platform between the two cars. The signal to stop was given before. That is the reason. I went up the steps and through the coach.

Transcript, page 119.

Q. When you got off there, who was first off on the ground?

A. The conductor.

Q. He had his lantern?

A. Yes.

Q. Was it lighted?

A. Yes, sir.

Q. Did he have it on his arm?

A. I think he was carrying it in his hand.

Q. And the brakeman had what you call the markers?

A. Yes, sir.

Q. And he had preceded you?

A. Yes.

Q. Did you see him when you came out?

A. He was just about the door when I went through.

Transcript, page 120.

Q. That train was moving back at the time, not over as fast as a man could walk?

A. Yes, it was under better headway than that.

Q. Five or six miles an hour, do you think?

A. Well, I should judge something like that.

Q. And you didn't hear any bell or whistle, but there might have been such a thing, and you not heard it?

A. Yes, sir, there might have been. I could not say whether there was or not.

Q. Like a man sitting in a room, and a clock would strike, and he might not hear it?

A. Yes, that is the idea, exactly.

Q. Unless his attention was particularly directed to it, why, he might not hear it.

A. That is true.

ARCHIE WORTHINGTON, plaintiff's witness, testified as follows:

Transcript, pages 128 to 130.

Q. Now, just tell the jury what the first thing was that you noticed, and what you saw and heard at the time of the accident.

A. Well, the first thing I heard was the signal for the train to stop; and, well, before that, before the signal, I seen the conductor, Mr. Keyzer, come through the coach. He had a lantern in his hand. He stepped to the door, and just as he opened the door and stepped on the platform he says, Look out! Look out! And at that why he stopped the train—give a signal to stop the train. Well, I jumped up. I knew there was something or other had stopped the coach. He said something about it being too bad, too bad! Something to that effect. At that I got off the coach and went on down, and saw the boy. He was over the bank. There was an embankment and he had some way or other rolled over the bank after the train had run him over. When I got there he was sitting up, and I think it was Mr. Elston was tying his leg up with rope or something.

Q. Which side of the train were you on, the river side or the other side?

A. I was on the river side.

Q. And the conductor came right there; and you was sitting here facing the back end, and he came through and opened the door?

A. Yes, sir.

Q. Now, how long after he had opened that door was it that he halloed?

A. Just as soon as he got on the platform he says, Look out! Look out! At that he—

Q. Did he halloo in a frightened sort of way—shout to them?

A. Well he hallooed pretty loud, yes.

Q. Did he appear to be excited?

A. Well, I don't know as he appeared to be—

Q. Just tell the jury about his manner.

A. Well, as near as I can recollect he hallooed fairly loud for him to get out of the way, I suppose. He says Look out! Look out! At that he reached up and pulled the string and stopped it. And then I—of course I got up and as I went out—started to go out—why he said something or other about it was too bad, or something or another of that kind. I don't just remember what it was he said, but I think that was what it was.

Transcript, pages 131 to 132.

Q. Where was this brakeman?

A. Well, I never seen the brakeman at all.

Q. You didn't see the brakeman?

A. Not that I remember, seeing the brakeman at all. If I did I never noticed.

Q. The brakeman had not got along there, you are quite sure, when he pulled that bell?

A. No, the brakeman had not.

Q. Of course, after that there was some excitement I presume?

A. Oh, yes.

Q. Now, did that train make any—how was it about the noise—whether the train made any noise or not—did you notice.

A. You mean whistle?

Q. No. I mean the train itself.

A. Well, I don't—I suppose it did some. I never paid any particular attention.

Q. You didn't notice.

A. No I didn't notice.

Q. Well, sir, did you hear the bell ring?

A. I did not.

Q. Or the whistle sound?

A. No, sir.

Q. Would you have heard—were you in a position so you probably would have heard?

A. Well, I could not particularly say about that because I was not paying much attention. The way it was—

On cross examination he testified as follows:

Transcript, pages 134 to 137.

Questions by Mr. Fenton.

Just a few questions, Mr. Worthington. As I understand you, you were going from Portland to Oswego?

A. Yes, sir.

Q. And when you got to Wilsonia the train made this switch?

A. Yes, sir.

Q. And turned the engine around on the other side?

A. Yes, sir.

Q. And you were sitting in this coach, two or three seats from the back end of it, facing towards Oswego?

A. From the front end, that was, going towards

Oswego. I was sitting two or three seats from the end that struck the boy.

Q. Yes, I understand; and on the west side of the car?

A. And on the east side of the car.

Q. On the river side.

A. Yes, sir.

Q. And you saw the conductor come through with his lantern, and you saw him go outside and call out to somebody—you didn't know who it was?

A. No, sir.

Q. Look out?

A. Yes. Just as he opened the door he stepped out and says, Look out! Look out!

Q. And then what did he do?

A. He pulled the string.

Q. Now, where did he get that string?

A. It is right up over his head, about that far, and he reached up—

Q. And that string sounded—when that string was caught what happened?

A. Why, there was two—he pulled—there was two whistles or whatever it is to stop the train.

Q. Now, then, how long would you say it was from the time he pulled the rope until the train actually stopped—I mean now in time?

A. Well, I could not say just how long it was in time.

Q. About how long? Suppose you had your watch, now, and were thinking—About how long does it seem to have been to you?

A. Oh, I could not say. It stopped right immediately. It ran, I should judge, about forty or fifty feet.

Q. That is to say, after the whistle was given, the bell to stop—it ran forty or fifty feet?

A. Yes, sir, something like that.

Q. And did you get up out of your seat and go out on to the rear platform?

A. Yes, sir.

Q. And had the conductor gone down the steps?

A. As I first got up he was standing in the door, I believe, and then he got down and went on.

Q. Was the door open at the time you first saw the conductor in the door?

A. Yes, sir.

Q. Had it—do you know if the door was open as they were backing?

A. No, I think not. I think as the conductor came through with his lantern he opened the door.

Q. And did it swing back,—fasten?

A. Well, I don't remember that—whether it did or not.

Q. But he stepped clear out on the platform and called to somebody?

A. Yes, just as he stepped out on the platform he said, Look out! Look out!

Q. Now, you don't know where the boy was at that time?

A. No, I do not.

Q. These coaches were lighted, were they?

A. Yes, sir.

Q. And they had glass windows on both sides?

A. Yes, sir.

Q. And this door had a glass window?

A. Yes.

Q. And will you say that train was backing at the rate of four or five miles an hour?

A. Well, I could not say positively, but I think it was traveling a fairly good lick.

Q. Stopped within fifty feet.

A. Yes, something of the sort.

It will be seen from the foregoing testimony that plaintiff and his friend Emmett saw the lights of the train, and Emmett saw the lights shining through the panel of the rear door. Neither Evans nor Emmett heard any whistle or bell ringing, but they both admit that they were not paying much attention, being engrossed at the time in catching the train. The other witnesses did not hear the whistle blown or the bell rung, but they admit that they were not paying any attention. Evans testified that he saw no one on the rear end of the train, but all the other witnesses testified that Conductor Keyzer was there. The only conflict of testimony as to this fact is to how long Conductor Keyzer had been on the rear platform with his lantern before Evans was struck.

H. N. MOONEY, fireman on the train, testified as follows:

Transcript, pages 274 to 277.

A. Well, we arrived at Wilsonia on time, and it

was necessary for us to make a drop of the train at Wilsonia. We dropped the engine up what is the main line now—it was the new line at that time—and let the coaches up the old main line, which is passing track now. We let them run by about—I don't know just how far they did go by, but in the clear anyway. As long as it was in the clear, that was all that was necessary. It might have been one car and might have been two. Of course, at the time I didn't pay any particular attention. And we backed up and got on the other end of the train, of course, what was the rear end coming in, and we started up slowly. Of course, we would start slow—a small engine, two cars. We hadn't gone far until we got a couple of whistles to stop—communication whistles, two. We stopped at once. Just about the time we got stopped, why, I saw this man rolling down at the side of the track. He also hallooed, and we stopped right away. I got out of the cab and went down there. I asked him what was the matter, and he didn't seem to say very much. He seemed to be all out of wind. I could see his foot hanging up on the briars there. So I rushed back up to the cab, and got a bell-cord we had there—not a bell-cord really, but it was a small cord we had back of the seat box. And the time I got back there, why, there were several fellows there—I don't recognize who they was now—and corded his leg up. I don't know who did the cording, but I helped. There were several there doing the work.

Q. Who gave the signal to stop, and from what part?

A. Why, I don't know anything about that. I suppose the conductor did.

Q. What part of the train did it come from, or did you know? Could you tell?

A. I don't know anything about that. Just got communication whistle—two whistles.

Q. That signal was communicated by what means? By a bell cord?

A. That is a signal cord operated by the air. It blowed a little whistle in the cab.

Q. And then about how far do you think that train moved after you received that signal?

A. Well, I don't suppose it went more than probably 30 feet.

Q. Do you know the length of those coaches—about what they were?

A. About 55 feet.

Q. How many coaches did you have in that train?

A. We had two.

Q. And what size engine did you have?

A. We had a 16x24; the smallest size we have got on the road here.

Q. How was that engine fired: In what way? What fuel did you use?

A. We used fuel oil.

Q. I will ask you whether or not the headlight on that engine was burning?

A. The headlight, no, it was not burning. I had it covered.

Q. How?

A. I had the headlight covered.

Q. Just explain that.

A. Well, the headlight would be up against the coaches now; but the rear light was open—burning.

Q. What rear light was that?

A. That would be, when we were leaving Oswego, that would be our headlight then.

Q. It had headlight on each end?

A. Yes, sir. This engine runs both ways.

Q. Was that headlight burning?

A. Yes, sir.

Q. What kind of headlight was that?

A. Acetylene gas.

Q. How much of a light does it give on a dark night?

A. It gives a fairly good light.

Q. I will ask you to state to the jury, if you know, whether that headlight showed any reflection outside.

A. Yes, it does.

On being recalled he testified as follows:

Transcript, pages 304 to 305.

Mr. Mooney, what have you to say about whether that bell was ringing, and what kind of a bell it was, at and immediately after this accident occurred?

A. Well, it was ringing.

Q. What kind of a bell is it?

A. Well, it is an ordinary engine bell, I presume.

Q. Did you have anything to do with operating it, or who operates it?

A. Why, I do, excepting in a case of this kind, where he turned on the air—rings it automatically.

Q. What is your recollection as to when that bell started to ring and when it discontinued ringing?

A. He commenced ringing it as soon as we commenced switching, after we had pulled up at Wilsonia and let the passengers off.

Q. And how long did it continue ringing?

A. Until we got to Oswego.

F. T. CRAW, the engineer, testified as follows:
Transcript, pages 287 to 290.

Q. Then you moved your engine up, and coupled on?

A. Backed the engine past the coaches that were on the main line, until the engine was on the main line, and then headed the engine up on the coaches, coupled on the coaches.

Q. Who worked the switch?

A. The conductor watched the switch.

Q. Who was the conductor?

A. L. D. Keyzer.

Q. After he had worked the switch, did he throw it back again to get on and line up?

A. Yes.

Q. Then what happened?

A. He steps right onto the pilot, because it was

right there by him, rode up to the coaches on the pilot, on the train.

Q. Then where did he go?

A. He went inside of the car.

Q. How long had he been gone inside of the cars, would you say, before you got the signal? When did you get your signal to go ahead?

A. Now, to make it plainer, in making this drop, after the brakeman had cut the air, he climbs up onto the platform. That would be between the engine and the coaches, or it would be on the coach next to the engine, where he could break this connection after giving the cars a good start; then after giving them head, as we call it, he pulled the pin, the engine goes ahead, and runs up the main line in the clear; when he clears he sets the brake behind the cars; then the engine couples, then passed over the switch; throws the switch, steps on the pilot, and rides up till we catch the coaches. Then he goes on the inside of the cars, and he does the coupling up of the air and things necessary.

Q. After it is coupled up, who gives the signal to go ahead?

A. In this case, the brakeman.

Q. Had the conductor gone into the car before the brakeman began to couple up?

A. Yes. He got off the pilot as soon as he touched, went right up into the coaches.

Q. What did he have on his arm??

A. He always carried a lantern.

Q. White light?

A. Yes, sir.

Q. Standard lantern?

A. Standard lantern.

Q. Where was he going when the brakeman was coupling up the air?

A. He went inside the car and closed the door.

Q. After he had gone inside of the first coach, started on, and after the brakeman had coupled up, coupled the hose up, the brakeman had given you a signal to back up, how far did you move before you got a signal to stop? Two signals to stop?

A. Well, two or three cars, possibly.

Q. Quite a distance?

A. Yes.

Q. About what is the length of those cars. Do you know the length of them?

A. It cannot be far from fifty feet.

Q. So you think you moved about 100—you said two or three car-lengths?

A. Two or three car-lengths.

Q. 100 to 150 feet, you think you moved, before you got the stopping signal?

A. Yes, sir.

Q. Where did you get the stop signal?

A. From the coaches, the whistle was blown.

Q. Could you tell from which coach the signal came?

A. No, sir.

Q. Well, then, how soon after you got the signal to stop was it that you did stop?

A. Oh, at once.

Q. How far did the train move after you got the signal, could you tell?

A. It don't seem as if it could move 20 feet, under the conditions.

Q. Could you say whether it moved as much as 20 feet, or 30 or 40, or what would be your judgment now?

A. I would say between 20 and 25 feet.

Q. How did you stop the train?

A. With the air-brake.

Q. And what was the grade? Was it going up hill at that point or not?

A. It was up-grade.

On being recalled he testified as follows:
Transcript, pages 302 to 304.

Mr. Craw, I didn't ask you anything about the bell on that engine. I wish you would state to the jury what the fact is, if you recollect and know, as to the ringing of the bell while you were switching, or at any time before this accident.

A. The bell was ringing.

Q. Well, now, how does that bell operate?

A. It is an automatic arrangement; rings with compressed air.

Q. Who rings it?

A. It is on the engineer's side, as we term it.

Q. Who would have charge of the bell?

A. I would.

Q. What was the object—what is the object of

ringing the bell, and where would it begin to ring, and where would it discontinue ringing?

A. Our instructions are never to move without first ringing the bell.

Q. Now, when you came into Wilsonia from the north, did you stop after you started to switch?

A. Yes, sir.

Q. Stopped the train?

A. Yes, sir.

Q. Well, then, when you started up again, what was done with reference to the ringing of the bell?

A. Why, I started it at work—started the ringer.

Q. Now, let me ask you to explain to the jury the difference between an automatic engine bell, and the old cord and rope.

A. We also have a rope.

Q. Well, I want to know, when you start an automatic engine bell to ringing, whether it will ring until something is done?

A. Yes, sir, at all times.

Q. Just explain to these men how that works.

A. It is a little air-engine, that works the compressed air. When the air is turned onto the ringer, it rings the bell, and when it is turned off, it stops the bell.

Q. Where, in the operation of this train as it was at that time, was it proper to ring this bell, or to discontinue it? How continuously was that bell run up to the time of the accident?

A. Why, it was ringing before we started to

move, and all the time after, until we got to Oswego.

Q. Then, do I understand you as saying that it was ringing while the train stopped there where this accident occurred?

A. Yes, sir, all the time.

Q. Well, was it so that anybody could hear it that listened?

A. Pretty good bell. It is a pretty good bell, as I remember it.

Q. The ordinary engine bell for that purpose?

A. Yes, sir.

L. D. KEYZER, the conductor, testified as follows:

Transcript, pages 321 to 327.

Q. I wish you would explain now, in your own way, tell this jury how you came into Wilsonia, what you did up to the time of the accident, explaining fully without my asking you further questions, if you can.

A. We arrived at Wilsonia on time, about 10:34. On account of the company changing the line at Oswego—which is called the Willsburg cut-off—it was necessary to drop the coaches at Wilsonia and shove them up to the depot at Oswego, because we could not make the switch at Oswego, as we did heretofore. We made the drop at Wilsonia, and we backed the train over the trestle at Wilsonia, and the brakeman rode the rear end back over the trestle, and then came up forward and cut the hose. There is two hose—the air hose and signal hose, and you have got to turn four angle

cocks to do it. While he was backing up and working that hose, I worked the switch this way, to be at work properly, because it is always customary to work the switch before you make the fly, because if you don't you are liable to ditch the cars. There may be a gravel between, and if there is you cannot throw it, so it is customary to work the switch before. So the brakeman hallooed, and I gave him a lantern to come away. We dropped the cars something like 20 feet into the clear. I threw the switch up for the main line, give the engineer the signal to back up, we headed in on the coaches. I rode the pilot in. Coupled up to the train. Before they coupled up, I dropped off the pilot, jumped up the steps of the rear coach, and went through the train to the front platform. When he coupled up, and the air released, the brakeman gave a signal to come ahead. Of course, I could not see what he was doing—I was up ahead. We went ahead, I should judge, between four and five car-lengths, as near as I could estimate the distance. And in the shadow of the darkness I saw two men coming down the track, and they were running, and I called to them to look out for the cars, the train is backing up. And one of the men got off the track, and as he did, he spoke to his partner,—I didn't know who they were at that time—to get off the track; and his partner used some profane language, something like saying he would catch them anyway. But I saw he was not going to get off the track, and I reached up and stepped on the threshold of

the door—I had to reach the cord; it is about four inches higher than the platform, the threshold is, and it makes it easier to reach the cord. So I stepped on the floor and stepped on the threshold, and gave two jerks. That means stop at once. It blows a little whistle in the engine. And just before we stopped we caught this Mr. Evans right in the face, right here, struck him on the face with the corner of the car, and he did fall down outside, over the rail, and one pair of wheels went over his leg, because I could feel the jar of the cars as it went over. And I says to myself, “We have got somebody’s leg.” And we stopped in about 30 feet, I judge, 30 or 40 feet. And we got out as quick as we could. He was down in the brush. He jumped, of course, on account of the pain, he jumped like a chicken with his head off. We jumped down and picked him up. The fireman came down there, and Mr. Emmett was there. Somebody suggested a rope, so he would not bleed to death. Mr. Craw went into the engine and got a rope. We tied his leg up as tight as we could, and brought him into the coach. After backing up so the platform would be right opposite where Mr. Evans lay, we carried him in there, and in there I asked him what was the reason he was running—was somebody after him? I supposed somebody was chasing him, because I couldn’t understand why they was running down the track that way, at such speed. And he says, “We were trying to catch the train at Wilsonia, supposing it was going

to leave from there." And I think I asked him if anybody informed him that the trains did not come back to Oswego any more. I says, "Who do you blame for this?" He says, "I don't blame anybody but myself." He says, "It is my own damn carelessness. Some more of my bad luck." But he used profane language in there.

Q. Now, Mr. Keyzer, at the time you went from the steps of the rear coach next to the pilot, the two coaches were coupled together?

A. Yes, sir.

Q. And you left the brakeman in the act of coupling up the air between the pilot and the rear coach?

A. Yes, sir.

Q. Then you went, as I understand, into the first coach?

A. Yes, sir.

Q. Through that into the second coach?

A. Yes, sir.

Q. Which would be the coach ahead?

A. Yes, sir.

Q. As you were backing up?

A. Yes, sir.

Q. Now, did you notice Mr. Elston? Are you acquainted with Mr. Elston?

A. Yes, sir.

Q. Do you remember seeing Mr. Elston in the rear coach?

A. On the front platform of the rear coach, between the cars.

Q. Oh, you saw him as you went through there?

A. Yes, sir.

Q. Where was he?

A. Standing to the right of the door, on the platform

Q. Between the two cars?

A. Between the two cars.

Q. Well, now, at that time—what did you do when you passed him there? Where were you going?

A. Going up to the front end, the front platform.

Q. When you say front platform, you mean the one that is nearest to Oswego?

A. Yes, sir.

Q. As you were intending to back up?

A. Yes, sir.

Q. Now, what was your object in going up there?

A. Simply to be on the front end before backing the train, is all.

Q. Did you go onto that platform before you began to back that train?

A. Yes, sir.

Q. What did you have on your arm, if anything?

A. A lantern, white lantern.

Q. When you say white lantern, what do you mean by that?

A. Regular signal lamp which railroad men carry; company lamp.

Q. Was it lighted?

A. Yes, sir.

Q. What kind of a light does it give?

A. Fairly good light.

Q. Now, then, something has been said in the testimony here, and in statement of counsel about marker lights. I wish you would tell the jury what marker lights are for, and who handles them, and when they are to be put onto the train in those circumstances.

A. Marker lights is green and red light, combination light. They are about this tall, and weigh ten or fifteen pounds apiece, and they are on the rear of the train, passenger and freight trains, to indicate the rear of the train. The red light is on the rear one, to avoid trains from running into it. And that is all marker lights are used for.

Q. I will ask you to state to the jury whether or not those marker lights are intended to be on a car that is backing, or whether they are intended to be on a car that goes ahead.

A. They are intended to be on a car that goes ahead. That is what they are for.

Q. If I understand you, they are lights between stations?

A. They are lights between stations, yes.

Q. They are red behind and green in front?

A. Red behind always; green in front and green to the side.

Q. Suppose those marker lights had been on and an employee had seen them, that was familiar

with the company's rules and management, had seen those marker lights on there, and had been south, in this instance, we will say, towards Oswego, from the train, and marker lights had been up, what would that employee have understood by those marker lights, with reference to which way that train was going to go?

A. Why, I should think he would understand that it was leaving town.

Q. Going to Portland?

A. Going away from the place, yes.

Q. And if the lights in those circumstances had been back—if the train has been backed with the lights in that position from the employee, the employee would be deceived, would he?

A. He would be deceived in that case, yes, sir.

Q. I will ask you to state, if you know, what object there is in having a man on the rear of a car with a light when the train is backing. Does it have any relation to crossings, or yards, or anything of that kind?

A. Not to my knowledge.

Q. That was the rule, or rather that was the method by which you were to move the train backwards?

A. In switching or making up cars, I don't think it is necessary.

Q. But after you get done switching, though, you are supposed to be on the rear of the car with a lamp?

A. It is proper to be on the front end, yes.
Transcript, pages 331 to 332.

Q. Now, Mr. Keyzer, I will ask you if you recollect hearing the bell on the engine on that evening at any time shortly before or during the accident? What is your recollection about that?

A. Yes, sir, the bell was ringing all the time, continually.

On cross examination he testified as follows:
Transcript, pages 332 to 336.

Q. Mr. Keyzer you say that you were out on the front end of the coach there before the train started?

A. Yes, sir.

Q. With your light?

A. Yes, sir.

Q. You are sure about that, eh?

A. Quite positive, yes, sir.

Q. And you are quite sure that you continued to remain there until after the boy was struck?

A. I had no occasion to go in again.

Q. Well, did you go in?

A. No, sir.

Q. How long a period of time elapsed between the time that you went out on the front end before the train started and the time when the train struck the boy? Now, how long a time was that?

A. It could not have been very long, because we only went four or five car-lengths. It could not

have been over a minute and a half—something like that.

Q. You are quite sure that you were standing out on the end of the coach there next to Oswego, with your light, while the train was going four or five car-lengths before it struck the boy?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. You don't think you could be mistaken about that?

A. I know—I am satisfied that I am not mistaken.

Q. And your lantern was burning brightly?

A. Brightly, sir.

Q. That was your duty to do?

A. That was your duty, to be there.

Q. You did your duty?

A. Naturally would.

Q. When Mr. Worthington said that you had just reached the door and opened it, and stepped one foot out there on the platform when he heard you halloo, he is mistaken about that, is he?

A. He must be mistaken; must be mistaken; because one cannot see out of the darkness. The minute you come out of a lighted car you don't see nothing. You must be out there a minute before you can see anything, out of a lighted room, on account of the darkness.

Q. You saw Evans coming?

A. Yes.

Q. How far was he away on the track?

A. Not over 20 or 25 feet—something like that—because you couldn't distinguish anything, on account of the darkness, until the rays of the windowlight fell on the track; then you could see. Then you wouldn't be positive it was a man.

Q. You are quite sure, then, that you saw Evans 20 or 25 feet away?

A. 20 or 25 feet from the rear end.

Q. How far away was he when you halloooed to him to look out?

A. He couldn't have been over fifteen feet—something like that—because I was not positive it was anybody when I first saw the shadow.

Q. If he heard you halloo fifteen feet away, he ought to have got off, with that train running four to six miles an hour?

A. Mr. Emmett got off. I didn't understand why Mr. Evans didn't get off. That is what puzzled me, when I saw he was not going to move to get off, so then I pulled the bell.

Q. Emmett was behind Evans?

A. Emmett was a short distance behind, not very far.

Q. About 10 or 15 feet?

A. I don't think he was that far.

Q. Now, isn't it a fact that you came out there, and stepped out onto that platform holding the door here in one hand—just stepped out there and flashed your light out there, and that you saw Emmett instead of Evans, and that the car had

just instantly struck Evans as you stepped out? Now, isn't that the fact?

A. No, sir.

Q. You are sure you saw the two of them?

A. I saw both of them, yes, sir.

Q. The first was at least 15 feet away?

A. I don't think he was that far.

Q. You said that, didn't you?

A. I thought you meant separate from each other. From the rear end?

Q. No, I say from you—from the car.

A. At least 15 feet from the car, yes, sir; and he was looking down at the track—he was not looking at the train. He was looking down at the track, and was not looking at the train at all—just hammering it along—for fear he would fall down.

Q. Could he see the track?

A. I guess he saw the track all right, because he was watching his feet so he would not fall. It wouldn't have made any difference if the train had been afire, he wouldn't have seen it.

Q. You think if you had been in Evans' place you would have had ample time, after the conductor came out there, to have got away before the train hit you?

A. I am satisfied I would, yes, sir.

Q. And you swear positively that you was on the back platform?

A. I swear positively that I was on the back platform.

Q. On the front platform of that back coach when the train started to move on?

A. Yes, sir.

Q. With your light?

A. Yes, sir.

Q. And that the train had gone three or four car-lengths before it hit the boy?

A. Three or four car-lengths before it hit the boy.

Examination by the court.

Q. Mr. Keyzer, did you get out on the back platform before the train started to move, that the train was coupled on?

A. Yes, sir.

Q. You were out there before it started to move at all.

A. Yes, sir.

Q. Who coupled the engine onto the car?

A. The brakeman coupled the engine onto the car, and then coupled the car. There's two hose to couple, and four angle-cocks to turn. And while he was doing that, I was walking through the train to get to the front end.

Q. You got out there before the train started to move.

A. Yes, sir.

Q. With your light?

A. Yes, sir, white light.

N. P. SCRUGGS, the brakeman, testified as follows:

Transcript, pages 345 to 347.

Q. Let me ask you—did or did not the conductor have time enough, during the time that you were doing this coupling, to walk through both coaches and get onto the south end of that coach?

A. Yes, sir, he had plenty of time to do it; and I didn't give him a signal to go ahead the moment I cut the angles in but I waited until I heard the air released.

Q. What do you mean by that?

A. You see, when I rode the cars through into the clear, then I set the air on those two coaches, and that locked the wheels.

Q. Who would release the air?

A. The engineer, after I cut these hose, then he would release that from the engine. I waited till I heard that released. We have a little retainer, that we can hear whistle through the coach just when it is released. Then I gave the signal to go ahead.

Q. After you gave the signal to go ahead, did the train start?

A. Yes, sir.

Q. Then, what did you do?

A. Then I got up on the platform and took my markers down, which were still on.

Q. Where were these markers?

A. They were on the north end of the train then.

Q. Next to the pilot?

A. Yes, sir, next to the engine.

Q. You reached up to the end of the coach and took down a marker there, and then to the other side and took down another marker?

A. Yes, sir.

Q. What were those markers? What lights?

A. They were ordinary lamp-lights, but they were in a green and red globe.

Q. Were they lighted?

A. They were lighted, both of them.

Q. What were they for?

A. Well, they are to indicate the rear end of the train.

Q. What did you do then, after you took your markers down?

A. Then I started through the train to the other end.

Q. And did you get through to the other end before the signal to stop was given?

A. I got about the middle of the train, that is, between the two cars, when the signal was given, and I was possibly inside just a little ways when the air released.

Q. Of the second coach?

A. Yes, sir.

Q. That is of the rear coach?

A. That is the rear coach going towards Oswego.

Q. And when you got in the rear coach, before that signal to stop, I understand—who gave that signal, do you know?

A. No, sir.

Q. That signal to stop?

A. No, sir, I do not know who gave it.

Q. You didn't give it?

A. No, sir.

Q. Was the conductor in the car at that time, or was he out on the platform?

A. No, sir, he was out ahead of me. I had walked the one car, and was on the front platform of the rear car, when that signal was given.

Transcript, pages 348 to 349.

Q. Now, I will ask you to tell the jury whether you recollect anything about an engine bell on that engine that evening; what kind of a bell it was, and whether it was ringing from the time you got to Wilsonia until you got to Oswego.

A. Well, you know the engine bell is a large—about that size; ordinary engine bell; and it was ringing.

Q. Is it automatic or pull?

A. It has an automatic ringer on it, and it had also the old rope—the cord.

Q. Who manipulates the bell?

A. Well, I am not familiar with that part about it. I know the cord runs clear around on both sides.

Q. It is operated from the cab on the end?

A. Yes, sir, it is operated from the cab.

Q. Did the engine have a head-light on each end?

A. Yes, sir.

Q. What was done with the headlight next to the coach, after you started back?

A. They pulled the blind down over it. It was always down after I made the coupling. They nearly always left it there for me to see.

Q. Were those coaches lighted.

A. Yes.

Q. Now, I will ask you if the train made any noise in going south there, going up that little grade?

A. Well, yes. You never saw a train running that didn't make some noise, and especially in starting, like that—always do. There is more or less noise from the engine.

The foregoing testimony shows conclusively that every precaution was taken by the men in charge of the train to carefully handle the same while it was backing up towards Oswego. Lights were burning in the coaches. The conductor reached the rear end of the train, with a lantern on his arm, as soon as he could and was on the rear end when the trains started to back up, according to his testimony, and was, according to plaintiff's witnesses, on the rear end before plaintiff was struck.

It will be noticed that plaintiff's witnesses testified that they did not hear the bell ringing or the whistle blown, but admit that they saw the lights, and admit that they were not paying much attention; while defendant's witnesses, the fireman, conductor and engineer, testify positively, and without being shaken on cross examination in any particu-

lar, that the automatic bell was ringing from the time the train started until the accident happened. As to the effect of negative testimony such as given by plaintiff's witnesses, the court's attention is called to the case of *Rich v. Chicago, M. & St. P. Ry. Co.*, 149 Federal 79, where Judge Adams, speaking for the Eighth Circuit, in discussing the effect of negative testimony similar to the above, at page 82 said:

“In these circumstances the evidence under consideration was purely of a negative character and does not command itself to common intelligence or common experience as of any value. The witnesses may not have heard any warning given and yet it may have been given. The value of such evidence depends upon the existence of facts showing the likelihood that the warning would not have been given if the witnesses did not hear it. Such facts are absent in this case and we are left with the bald statement that the witnesses did not hear the warning as the only evidence that it was not given. They lived close to the yard and, as common experience teaches, had doubtless become so accustomed to the constantly ringing bells and sounding whistles as to be totally indifferent to them. As against this kind of evidence there is the positive testimony, unchallenged as to credibility, of the engineer and fireman who were at work on the engine in question, and two others who stood near by and in front of it as it was moving eastwardly, that the bell on the engine was constantly ringing as it was being backed eastwardly that

night. This evidence afforded by the two men whose duty it was to ring the bell, and by two others who actually saw the engine and noted its operations is positive and unequivocal in its character. The testimony of plaintiff's witnesses on the other hand, was of such a character, and attended by such circumstances as to be entirely true without affording any evidence of the fact sought to be established. This court has heretofore decided that in circumstances of the kind just disclosed there is no real conflict of evidence.

"In the case of *Chicago, etc. Ry. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65, speaking by Judge Van Devanter, the court said:

"'But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence.'

"In the case of *Baltimore & O. R. Co. v. Baldwin* (C. C. A.) 144 Fed. 53, the Circuit Court of Appeals for the Sixth Circuit examined the question now under consideration and announced its conclusion in the following words:

"'The result must be that purely negative testimony is not substantive, and amounts at most to nothing more than a mere scintilla.'

"To the same effect are the following cases: *Stitt v. Huidekoper*, 17 Wall. 384, 21 L. Ed.

644; *Horn v. Baltimore & O. R. Co.*, 4 C. C. A. 346, 54 Fed. 301; *Hubbard v. Boston & Albany Railroad*, 159 Mass. 320, 34 N. E. 459; *Culhane v. New York Central & H. R. R. Co.*, 60 N. Y. 133, 137. In the last-mentioned case, the Court of Appeals of New York had facts before it quite apposite to those now before us and said concerning them as follows:

“It is proved by the positive oath of the two individuals on the engine—one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. * * * As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere ‘I did not hear’ is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact.’

“While the foregoing rule is a valuable one to prevent speculative and unwarranted verdicts and should be fearlessly applied in appropriate cases, no liberty should be taken by

the trial judge under its supposed protection to weigh the force or value of evidence which is substantially contradictory. Where 'Circumstances attending the failure to notice an occurrence are such as afford reasonable ground to believe that if the occurrence had happened it would have been noticed by the witness, the failure to notice it may be and frequently is some evidence that it did not occur and should go to the jury for its consideration;' but when, as in this case, the failure to notice an occurrence is attended by no facts or circumstances tending to show that the witnesses would likely have noticed it if it had occurred, it should never be availed of to excuse an unwarrantable verdict. There was no evidence to support the fourth specification of negligence, namely, that the defendant failed to maintain a lookout to warn the decedent of the approach of the engine."

See also *Hunt v. N. P. Ry. Co.*, 196 Fed. 180-187, and 23 Am. & Eng. Ann. Cases 1912-B, foot note page 1133.

From the testimony in this case it is very hard to see how two men could reasonably differ as to the defendant having exercised the utmost care in handling this train.

While negligence is ordinarily a question of fact for the jury to determine, nevertheless in this case, assuming plaintiff was a licensee, it is respectfully submitted that the evidence is clear, convincing and conclusive that defendant did not violate any

duty owing to plaintiff as a licensee. And in instructing the jury the trial court clearly recognized how far from negligent the defendant was, when it said, page 370, transcript:

“And I come all the more satisfactorily to this decision because of the testimony that has been developed by the defendant in showing that it did exercise very great care in the movement of that train at that point, and that there was not negligence in the movement of the train upon the part of the defendant that would render it liable.”

WAS PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW?

It was not intended to take up so much of the court's time in discussing questions not properly raised by the record, but we deemed it necessary to answer plaintiff's contentions.

Plaintiff clearly cannot recover in this case, if guilty of contributory negligence, although defendant was negligent in failing to provide a light or suitable warning. It is sufficient to refer to the authorities under point 5 and to quote from the opinion of this court in the case of *N. P. Ry. Co. v. Jones*, 144 Fed. 47, where the court, speaking through Judge Gilbert, at page 49, said:

“Assuming that the evidence which went to the jury proves that the railroad company was negligent in not discovering the presence of the defendant in error on its track, what shall

be said of the evidence of the contributory negligence of the defendant in error? A general license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself. If the negligence of the defendant in error was one of the proximate causes of the injury which he sustained, if it directly contributed to the unfortunate result, he cannot recover, even though the negligence of the plaintiff in error contributed to it; and the rule is the same whether the injured person be a trespasser on the railroad track or a licensee. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 66 Fed. 115, 13 C. C. A. 364, 371, 28 L. R. A. 181; *Felton v. Aubrey*, 74 Fed. 350, 360, 20 C. C. A. 436; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; *Louisville & N. Ry. Co. v. McClish*, 115 Fed. 268, 273, 53 C. C. A. 60; *King v. Illinois Central Rr. Co.*, 114 Fed. 855, 862, 52 C. C. A. 489; *Missouri Pacific Railroad Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, 645.”

And as stated in point 3, a railroad track is notice of danger and imposes upon the traveler or person using it, whether he be a licensee, or a trespasser, the duty of exercising the highest degree of care. He takes the risks subject to its concom-

itant perils. This principle is ably set forth and discussed in the case of *Garlich v. N. P. Ry. Co.*, 131 Fed. 837, where the court for the Eighth Circuit, speaking through Judge Lochren, at page 839, said:

“The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and that when a person goes upon such track, or so near as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm. And no reliance on the exercise of care by persons in control of the movement of trains or engines will excuse any lack of the exercise of such care by persons going upon such tracks. If the use of these senses is interfered with by obstructions or by noises, ordinary reasonable care calls for proportionally increased vigilance. *Blount v. Grand Trunk Ry. Co.*, 61 Fed. 375, 9 C. C. A. 526; *Pyle v. Clark*, 79 Fed. 744; 25 C. C. A. 190; *C. St. P. M. & O. Ry. Co. v. Rossow*, 117 Fed. 491, 54 C. C. A. 313; *C. & N. W. Ry. Co. v. Andrews* (C. C. A.) 130 Fed. 65.”

See also *N. P. Ry. Co. v. Jones*, 144 Fed. 47-50.

And as stated in point 4, it is the duty of one approaching a railroad track, or one using it, to stop, look and listen, and to ascertain his position and the circumstances surrounding his position, and a failure to exercise the highest degree of care imposed by reason of the conditions and circum-

stances into which he has brought himself, is negligence. This principle is ably illustrated in the case of *Railroad Co. v. Houston*, 95 U. S. 697, where the court, speaking through Mr. Justice Field, at page 702, said:

“And she was at the time on the private right of way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company’s employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure.

Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation.”

See, also, the case of *Morgan v. N. P. Ry. Co.*, 196 Fed. 449, 9th Circuit, decided May 20, 1912, where the court, at page 453, said:

“One who at any time voluntarily places himself in such a dangerous place as between the rails of a railroad is certainly chargeable by the law with the duty of looking and listening for trains that may be coming from either direction, which duty was greatly enhanced on the occasion in question, when, according to the evidence, the night was very dark and a strong wind was blowing. In a similar case before this court a few years ago (*Northern Pacific Railway Co. v. Jones*, 144 Fed. 47, 75 C. C. A. 205, we said:

“‘A general license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself. If the negligence of the defendant in error was one of the proximate causes of the injury which he sustained, if it directly contributed to the unfortunate result,

he cannot recover even though the negligence of the plaintiff in error contributed to it; and the rule is the same whether the injured person be a trespasser on the railroad track or a licensee.'

"Many cases are there referred to, to which reference need not be again here made."

It might be noted in passing that this case was one where the person injured assumed that the train which struck him was going down another track, just as in this case, plaintiff assumed the train would pull out from Wilsonia to Portland.

It is admitted that plaintiff and his friend Emmett intended to go to Oswego to catch the train to Portland, and in fact did start towards that point to take the train. (Transcript, pages 23 and 24, testimony of Thomas Evans.) The ticket read "Oswego and return." It is also admitted *that plaintiff and Emmett saw the lights of the train while standing at Wilsonia, and heard it switching.* They had no watch but thought it was getting ready to leave. They rushed up one of the paths from the foundry, used by the workmen of the Oswego Iron Works, to the right of way, and without investigating, turned and hurried north between the rails towards Wilsonia. It is admitted that plaintiff and Emmett did not stop to investigate at all, but assumed that the train was about to pull out towards Portland. The course taken by them was, as stated in the complaint, *convenient*

to catch the train. Without investigating, stopping, looking or listening, and knowing the train was at Wilsonia, giving plaintiff any view of the testimony you can, plaintiff and Emmett ran and trotted from the barn near the foundary, four hundred feet up a hill, then on to the right of way of defendant, and then down between the rails three hundred and fifty or three hundred and seventy feet to a point where the accident occurred. These are all admitted facts and the following testimony clearly shows that plaintiff was injured by his own carelessness and want of care.

THOMAS EVANS, the plaintiff, on direct examination testified as follows:

Transcript, pages 21 to 24.

MR. FENTON: As I understand, Mr. Latourette, he bought a ticket to Oswego and return.

MR. LATOURETTE: Yes, this is the half he had.

MR. FENTON: Oswego was his station he got on and off.

Q. Now, what did you do that evening with anybody?

A. Well, we went coon hunting that evening.

Q. Who?

A. Me and Pete Emmett and the Worthington boys.

Q. Coon hunting?

A. Yes, sir.

Q. Around up there in that neighborhood?

A. Yes, sir; up there about two miles.

Q. How far from Oswego?

A. About two miles, I believe.

Q. Up on the lake there?

A. No, I believe it was above the lake.

Q. Above the lake. Now, what time did you come back, Mr. Evans, to take the train?

A. Well, we left—the boys were still hunting when we left, and we left about 10 o'clock.

Q. What train did you aim to take to go back to Portland?

A. The 10:45.

Q. Now, you say you had been up there before?

A. Yes, sir, several times.

Q. And whenever you went up there, just tell the jury what you observed about the way the train made that flying switch so they will understand.

A. Well, every time I went up there before they always went to the station of Oswego, and then went on a little further south and switched. And they did that night when I went up; but while I was up there—I suppose it was the first train that was ever switched—they stopped at Wilsonia before they got to Oswego and switched there.

Q. Now, is that the way they did it on the day that you went up?

A. No, sir; they went past Oswego the day I went up.

Q. Well, that is what I say.

A. Yes, sir.

Q. Now, you went up about 4 o'clock?

A. Yes, sir.

Q. And they made the flying switch at Oswego?

A. Yes, sir, at Oswego, south of the station.

Q. That is, right near the station there?

A. Well, just a little ways.

Q. And when you came back to—this Emmett, did he live in Oswego?

A. Yes, sir.

Q. Your friend Emmett?

A. Yes, sir.

Q. He was a young man living there?

A. Yes, sir.

Q. And when you came back, what station did you intend to take the train from?

A. We intended to take it at Oswego.

Q. You intended to come back by way of Oswego?

A. Yes, sir.

Q. And did you start to go up to Oswego?

A. Yes, sir, that is where we started to.

Q. To take the train?

A. Yes, sir.

Q. What time of the evening was that?

A. Well, that was—we didn't know the exact time, but we knew we didn't have much time to get the train.

Q. Did you have any watch with you?

A. No, sir, I didn't.

Q. Did your friend Emmett have any watch?

A. No, sir, I don't believe he did.

Q. Well, now, from where you went up to the

railroad track, could you see the station of Oswego and Wilsonia both?

A. Yes, sir.

Q. That is to say, it was open view there?

A. Yes, sir.

Q. And this Wilsonia is on that line of road, is it?

A. Yes, sir.

Q. How is it situated with regard to Oswego—which direction is it from Oswego?

A. Why, it is north.

Q. And about what distance?

A. About—I measured it one time—1300 feet.

Transcript, pages 27 to 30.

Q. Now, describe to the jury how that train appeared to you when you saw it standing there.

A. Why, it was headed toward Portland—the train was.

Q. What could you see?

A. I could see the side lights and the engine there. Everything looked like it was headed toward Portland.

Q. And how close was it to the time, as far as you were able to judge, when it would start to go?

A. Well, we thought it had already been to Oswego.

Q. Now, then, what did you do from that time, when you went across this bridge on to the track, just tell the jury what you did, and what you saw, and what occurred. Go ahead.

A. Well, we came right up on the track, and

went right up the track, till it met me there and knocked me off.

MR. FENTON: I didn't hear.

A. We went up the track until the train hit me.

Q. Did you run?

A. No, sir, we started to run, and we was coming up the hill there; we had been running from the barn, and we was pretty well out of wind at that time.

Q. You started to run?

A. Yes, sir, we wasn't running at the time it hit me.

Q. How fast were you going when the train hit you?

A. As fast as I could walk.

Q. As fast as you could walk?

A. Yes, sir.

Q. Now, did you hear any bell rung?

A. No, sir.

Q. What?

A. No, sir.

Q. Did you hear any whistle?

A. None at all.

Q. Well, was there any bell rung or any whistle sounded on that train?

A. No sir, there was not.

Q. On that occasion.

Recess until 2 P. M.

THOMAS EVANS resumes the stand.

Direct examination continued.

Q. Mr. Evans, what kind of a night was it?

A. Well, it was rather dark.

Q. Was it raining?

A. No, sir.

Q. Cloudy?

A. Yes, it was cloudy and dark.

Q. What was the date of that?

A. The 25th of September.

Q. At about what hour?

A. I don't know the exact time but it was along about 10:45.

Q. In the evening?

A. Yes, sir.

Q. What amount of noise, if anything, was that train making? Did you hear anything?

A. Never heard a thing.

Q. What was the country there? Was it level or hilly?

A. Why, it was practically level.

Q. What was the road bed as to being level or otherwise?

A. It was level.

Q. Now, as I understand you had come up from below, or from the south or from the east of the track?

A. Yes, sir.

Q. How does the track run—what direction?

A. North and south.

Q. Pretty near north and south?

A. Yes, sir.

Q. And you had come from which side?

A. From the east side.

Q. What part of your person did the train strike?

A. What is the question?

Q. Where did it hit you—the train?

A. Why, it hit me in the face and breast.

Q. What part of the train hit you?

A. The back end when it was backing up.

Q. Well, what part of the end hit you? Just point out to the jury where it hit you and how it hit you?

A. Why, it hit me in the face, in the nose, and in the breast and knocked me back.

Q. Well, what happened then after the train hit you?

A. It run over me.

Q. Knocked you down?

A. Yes, it knocked me down when it hit me.

Q. How did you fall?

A. I fell on my face.

Q. You fell on your face?

A. Yes, sir.

Q. Did it turn you around?

A. Yes, sir, it certainly did.

Transcript, pages 35 and 36.

Q. Now, then, for what purpose were you going down the track?

A. Why, to get on the train to go to Portland.

Q. Now, you say you saw the train standing there?

A. Yes, sir, and I thought it was at Wilsonia.

Q. At Wilsonia station?

A. Yes, sir, that is where I thought it was.

Q. It was standing at that station, was it?

A. That is where I thought it was.

Q. Well, did you see it?

A. Yes, sir, I could see it.

Q. Do you know where the station was?

A. Just about, yes, sir.

Q. And could you see that the train stood there?

A. Yes, sir.

Q. And was it standing still?

A. Standing still when we saw it.

Q. Now, did you intend by going down that track to take the train, that particular train, the 10:45 train, back to Portland?

A. Yes, I intended to take it.

Q. From Wilsonia station?

A. Yes, sir.

Q. And that was a station between Oswego and Portland?

A. Yes, sir.

Q. On the defendant's line of road?

On cross examination he testified as follows:

Transcript, pages 37 to 39.

Q. Well, then, you had been to Oswego three or four times recently before this?

A. Yes, sir.

Q. Well, then, you were quite well acquainted with the station, Oswego, were you not?

A. Yes, sir.

Q. And the surrounding country.

A. Yes, sir.

Q. And the track between Oswego and Wilsonia?

A. Yes, sir.

Q. Now, Oswego, has been a station there for a great many years, hasn't it?

A. Why, for quite a while. I don't remember.

Q. How long has Wilsonia been a station before this accident?

A. I couldn't swear to that.

Q. Well, about how long?

A. I don't remember when it was put there, but it was there that summer.

Q. Yes, but you never got on or off at Wilsonia before in your life, did you?

A. No, sir.

Q. You always went to Oswego and got off, and you always got on at Oswego when you wanted to come back?

A. Yes, sir.

Q. And you never had been at the station of Wilsonia except to pass through it? You had never been at that station except to pass through it on the train, had you?

A. No, sir.

Q. Now, where were you coming from on that evening when you came up towards the right of way?

A. When we come from the right of way?

Q. When you came up from the east side of the

track, as you now say in your testimony, where were you coming from?

A. I was coming from the barn where the iron works keep their horses.

Q. Now, where is that with reference to Oswego?

A. That is a little northeast of Oswego.

Q. How far away from the station?

A. Why, it is about—I don't know the exact distance how far it is. It is not very far.

Q. A quarter of a mile?

A. No, I don't believe it is that far.

Q. An eighth of a mile?

A. Not any more than an eighth of a mile.

Q. Down under the hill, isn't it?

A. Yes, sir.

Transcript, pages 42 to 52.

Q. Don't you know that it was put in there by these people themselves for their own convenience to get onto the right of way, to go up to Oswego, and that you simply went up the hill, you both went up the hill onto the right of way, and got between the rails intending to go to Oswego?

A. No, sir. I intended to go to Wilsonia.

Q. But you were going to take the train at Oswego, weren't you.

A. No, sir, not when I come up on the track, I didn't intend to.

Q. Well, but before you got in sight of the cars, before you got over the hill, up onto the right of way, you expected to go to Oswego, didn't you, to get your train?

A. Before ever I seen the train at Wilsonia, I did.

Q. Yes, before you saw the train which you thought was at Wilsonia, you were started for Oswego station, weren't you?

A. We seen it before we started.

Q. I know you saw it, but before you saw the train it was in your mind—before you got to the right of way, before you got up the hill, you were started to Oswego, weren't you?

A. We seen the train when we was down by the barn.

Q. How far away?

A. Well, I don't know just how far it is from the barn to Wilsonia.

Q. Well, now, just about how far?

A. I should judge about one-eighth of a mile.

Q. About an eighth of a mile.

A. I don't think it is over that.

Q. That would be between six and seven hundred feet, wouldn't it?

A. Yes, sir, something—I believe it was a little further than that.

Q. Well, was it as much as 300 yards, do you think, from the barn up to Wilsonia?

A. From the barn to Wilsonia?

Q. Yes.

A. Something like that.

Q. Now, when you were at the barn intending to get ready to start to Portland, you saw the train at Wilsonia?

A. Yes, sir.

Q. What was it doing?

A. Standing there.

Q. Standing still?

A. Yes, sir.

Q. You knew it was at Wilsonia?

A. Yes, sir.

Q. And you knew that before you left the barn?

A. Yes, sir.

Q. Now, what did you see that made you know it was there?

A. Well, we could see the side lights in the coaches.

Q. There was no hill, or trees, or anything to obstruct your view?

A. No, sir.

Q. You saw it there at Wilsonia, standing still?

A. Yes, sir.

Q. While you were walking from that point all the way up?

A. No, sir. We seen it there, and went right on up the hill.

Q. Now, let me ask you this question, Mr. Evans. From the time you left the barn and walked in that path up to the right of way, could you see the train all the time?

A. No, sir.

Q. What kept you from seeing it?

A. Well, it is on the side hill there, and we never paid much attention to it. We was trying to get up there on the track.

Q. Now, what was there to prevent you from seeing the train at Wilsonia station just the same as you saw it from this barn?

A. Well, the further you went up the hill, you couldn't see the side lights.

Q. What obstructed your view?

A. Why, when we got up even with the end of it, you couldn't see the side lights.

Q. But you could see the train, couldn't you?

A. No, sir, it was dark.

Q. But you had seen it?

A. Yes, sir.

Q. And knew it was there?

A. Yes, sir. I knew it was there.

Q. And you couldn't see the body of the train when you got past where you could see the side lights?

A. No, we couldn't see the train after we got by, no, sir.

Q. Well, you saw that train when you walked a distance of about 600 feet, until you got past the side of the car, didn't you?

A. Yes, we could see it.

Q. And you could see all the way until you got near the end, behind it?

A. Yes, sir. When we got behind it we couldn't see it.

Q. And the thing that made you see it was the side lights on the coach?

A. Yes.

Q. And you saw that until you got between the rails?

A. Yes, sir.

Q. From the time you left the barn until you got between the rails, that train was in your eye all the time?

A. No, I wouldn't swear it was in my eye all the time I was going along.

Q. Well, you could see it if you had looked?

A. Well, maybe I could.

Q. Well, is that the fact?

A. No, I don't believe a fellow could, going along there, see it all the time.

Q. Most of the time you could see it?

A. No, sir, it is trees along there.

Q. Well, now, Mr. Evans, when you got over into the right of way, you got into a little cut, didn't you?

A. Yes, sir, at that time.

Q. There was quite a ridge on the east side of that track, isn't there, at that point?

A. Yes, sir.

Q. How high is that ridge would you say, above the level of the rails? As high as a man?

A. You mean?

Q. On the east side, as you came up the hill, isn't there quite a raise there, embankment, thrown off to one side?

A. Yes, sir, it is quite—

Q. You had to come down onto the grade between the rails, didn't you?

A. No, it is a side—tips right off from the side.

Q. The bank slopes down?

A. Not from the track. It slopes from the bank.

Q. Well then, you climbed up, didn't you?

A. Yes, sir.

Q. And when you got up there, when you got up to the point at the top of this grade, how far were you from the rails down there?

A. The rails below?

Q. Yes.

A. We come up on the rails. We wasn't above the rails at all.

Q. Is it lower—all the ground lower on the east side than the track itself?

A. Yes, sir.

Q. There is no embankment on the east side there at all?

A. No, sir.

Q. Perfectly level, or rather inclines down the hill—is that it?

A. It was, right along there where it hit me.

Q. But when you went up and went onto the track, did you climb up an embankment, or did you go down an embankment to get to the track.

A. Well, it was up hill to the track, if I remember right, right along.

Q. Well, when you first got up on top, did you see the train?

A. No, sir.

Q. How far away were you from the track when you undertook to look? Did you look after you got up there within a distance, I mean, close to the track, did you look to see where your train was that you had seen all the time?

A. Why, it was standing still; the last time I ever seen that train it was standing still.

Q. Well, now, did you run up the hill?

A. Yes, sir, we run up the hill.

Q. And did you run across this little culvert?

A. Yes, sir.

Q. And did you turn and run straight towards Portland?

A. No, sir, we was pretty well petered out when we got on top.

Q. Yes, you were tired?

A. Yes.

Q. But you did run up the hill, and run on the track between the rails?

A. Not all the way up the hill.

Q. You were running when you got onto the rails, weren't you.

A. No, sir.

Q. You still saw the train when you got between the rails, didn't you?

A. No, sir, we never seen it.

Q. Couldn't see it?

A. No, sir.

Q. Well, when did you first see it, now, after you got between the rails, before you were hurt?

A. Before I was hurt?

Q. Yes.

A. I never seen it at all before I was hurt after I got on the track.

Q. Well now, how far was it from where you first entered the track and got between the rails down to where Wilsonia was? About 600 feet you said, didn't you?

A. Where we got on the track?

Q. Yes.

A. No, sir, I didn't.

Q. How far did you say.

A. I should judge it was about, from where that trail comes on the track, about 800 feet.

Q. To Wilsonia?

A. Yes, sir.

Q. Well, now, how far had you gone from where you got on the track between the rails after you crossed this little culvert, how far had you gone towards the train before it struck you?

A. Why, I couldn't say, but we hadn't gone very far before it struck.

Q. Well, about how far?

A. Well, I couldn't say.

Q. A hundred yards, do you think?

A. No, sir, I don't think we went that far.

Q. One hundred feet?

A. Something like that. We hadn't went just a little ways.

Q. Who was ahead, you or the other man?

A. I was.

Q. What was his name?

A. His name was Emmett.

Q. How far ahead of him were you?

A. I should judge about 10 or 15 feet, I suppose.

Q. Did you, either of you, run after you struck the grade?

A. After we got on top?

Q. After you got on the track.

A. Why, we were trotting along part of the time.

Q. That is, you trotted towards what you thought was Wilsonia?

A. Yes, sir, we wasn't running.

Q. I know, but what was the reason you were trotting?

A. Why, we wanted to get the train to go to Portland.

Q. Didn't you know that it was your impression that that train was just pulling out from Wilsonia, and you were trying to catch it?

A. Pulling out to go to Portland?

Q. Yes.

A. No, sir, it was not. It was standing still.

Q. I say, wasn't that your idea at the time?

A. No, sir, it was not.

Q. You thought it was just leaving, and you could run and catch it—now, isn't that the fact?

A. No, sir, that is not a fact.

Q. You thought it was standing there?

A. Yes, sir, I did.

Q. And you didn't see the train approach you at all?

A. No, sir, or I wouldn't let it hit me.

Q. You didn't hear it approach you?

A. No, sir.

Q. And you didn't hear your companion call to you to look out for the train?

A. No, sir.

Q. You didn't hear the conductor or anybody else call from the train to look out for it?

A. No, sir, I did not.

Q. You didn't see it coming back.

A. No, sir, I did not.

Q. And yet you are willing to swear to this jury that you looked, you didn't see any brakeman or anybody else on the rear end of that train, or any light there?

A. It was none there.

Q. How do you know, if you couldn't see the train, and didn't see it?

A. Well, because it just knocked me off the side.

Q. I know, but if you looked and couldn't see the train, and couldn't hear it, and didn't know it was there, how could you say whether there was a brakeman or a light on the rear of that train?

A. There was no light there or a man could see it.

Q. You said there was no conductor, no brakeman, or no man there.

A. I couldn't say there was any there—never seen any.

Q. You say there was no one there, but you mean to say you didn't see anybody?

A. I didn't see nothing at all.

Q. As a matter of fact, did you look?

A. Yes, I had my head up like any man would.

Q. Where did this train strike you in the face?

A. Right in the nose, right there.

Q. Did it do any damage?

A. It skinned it, yes, sir.

Q. Any scar there now?

A. I don't believe so.

Transcript, pages 55 to 57.

Q. And when you left the barn, you started to take the train, as you say, at Wilsonia, and you got onto the track, and the train was still standing so far as you know?

A. Yes, sir.

Q. And you couldn't see the side lights, but you knew the train was there, and you never saw it and you never heard it until it ran the 700 feet? Now, is that true?

A. Yes, sir, I never heard it nor saw it, or I would have got off the track.

Q. Now, what were you doing?

A. I was going down the track.

Q. What did you have in your hands—anything?

A. Never had a thing.

Q. You had good eye-sight, didn't you?

A. Yes, sir, I had.

Q. You were an active young man?

A. Yes, sir, I was.

Q. And you ran part of the distance on the track?

A. No, sir, we never ran, after we got on the track. We went on a little trot, not to say run.

Q. Well, you made a turkey trot, as you say, on the track?

A. Yes, sir; but I was not running when that train hit me.

Q. I know, you stopped just before the train hit you, just into a walk. I understand that.

A. No I didn't stop just before it hit me. We walked a ways before it hit me, but how far I wouldn't say.

Q. Did the other man—what is his name?

A. Emmett.

Q. Did he trot or run?

A. He was behind me.

PETER JAMES EMMETT, plaintiff's witness, on direct examination testified as follows:

Q. When was it, about what time was it, that you left the barn with him to go to the station that evening?

A. Oh, about half past ten—10:35—somewhere along there.

Q. Did you have a watch?

A. No, I didn't have a watch.

Q. Just had to guess?

A. Just had to guess about that time.

Q. Now, in going from the barn to Wilsonia station, which way did you go?

A. Went right up past the old pump house, and up that walk.

Q. To what point?

A. To the railroad track there just below the depot.

Q. And then which way from there?

A. Went down the track.

Q. Well, which direction would that be?

A. North.

Q. Now, you say by that path. What path do you refer to?

A. The path that all the foundry boys goes to work on the trail that runs down to the foundry.

Transcript, pages 70 to 72.

Q. Now, you think it was about 10:30 or 10:35 that you and Mr. Evans started to go up to take the train?

A. About 10:30.

Q. And could you see any train before you got up to the railroad track?

A. Well, I heard it switching.

Q. You heard it whistle.

A. I heard it switching.

Q. Where was it then?

A. At Wilsonia.

Q. At Wilsonia station?

A. Yes, sir.

Q. And could you see some side lights down there on the train?

A. I don't know that I looked up to see any. I heard it, and I knew that it was there.

Q. Well, just describe to the jury now, what you did, and more particularly what Evans did from the time that he got onto the track, and what occurred. Tell the jury what happened.

A. Well, when we got onto the track he just went right down the track coming up from the foundry. We had been running, we was pretty tired, and just poking down the track, like a man would when he was tired; not thinking of the train backing up; thought it would be starting out the other way, and he just ran right into it—kind of trotted into it, as it was. I was a little behind him. He was a little better runner than I was—he was a little ahead of me.

MR. FENTON: That is, Evans trotted into it?

A. Yes, sir.

JUROR: Were you between the rails?

A. Yes, sir.

Q. Well now sir, what was the first thing you noticed?

A. The first thing I noticed?

Q. Yes, in regard to the train after you had got on the track.

A. When I got on the track?

Q. After you got on the track.

A. After I got on the track?

Q. Yes, when he was struck.

A. When he was struck. There was a man came to the door with a lantern just as the train struck him, and hallooed "Look out, look out."

Q. Just as the train struck him?

A. Just as the train struck him.

Q. Where did this man come from?

A. Just came right out of the coach.

Q. Out of what part of the coach?

A. The rear end, right out of the door.

Q. The end your mean, towards you?

A. Yes, sir.

Q. Towards Evans? Well now, which happened first—did the train strike Evans first, or did the man come out of the coach first?

A. There wasn't but very little difference. You could hardly tell.

Q. Just tell the jury what you saw about that just as near as you can.

A. Well, just about the time the train struck the boy, the man come to the door with a lantern, and he hallooed "Look out," and it just knocked the boy down, and it ran over his leg. And I crawled down to see where he went to. I never expected to see him alive.

JUROR: How far were you from the train then?

A. About eight or ten feet.

Q. Do you know who that was that had the lantern?

A. Well, I suppose it was the conductor.

Transcript, pages 73 to 74.

Q. You saw that afterwards, did you?

A. Just as the door opened I could see, when the train was coming, and it didn't any more than give me time to get off.

Q. Were you looking all the time as you were coming down there to see if there was any train coming, or in the way?

A. I don't know as I would have seen it if the door hadn't opened, myself.

Q. Was it pretty dark?

A. Fairly dark, yes.

Q. Now, was there any whistle or any bell rung there right before that accident?

A. Well, I didn't hear any myself.

Q. Well, were you in a position where you would have heard if it had been sounded?

A. I expect I would.

Q. Was there any signal of any kind given so as to warn Evans or yourself of the backing of that train?

A. Not that I know of?

Q. Any noise of the train running, or anything that you could hear?

A. Of course the train would make a little noise.

Q. Did you hear any noise?

A. I wasn't paying any attention to the noise particularly. I was expecting it was going the other way, and would start from Wilsonia.

Q. Was the wind blowing, do you know, that night?

A. No, I don't know.

Q. You say you and Evans had been running pretty fast?

A. Yes, sir.

On cross examination he testified as follows:

Transcript, pages 78 to 86.

Q. It is about the same distance, as I understand you, from the barn by way of that path to Oswego, as it was from the barn by way of that path to Wilsonia?

A. No, there is two paths. One runs from each depot to that foundry.

Q. Oh, then, there is a path that leads from this barn, that goes to Wilsonia?

A. Yes.

Q. At that time?

A. Yes, sir.

Q. And then there is another path that goes to Oswego?

A. Yes, sir.

Q. Now, which path did you and Evans take—the one that led to Oswego?

A. We took the one that led right up between Oswego and the—

Q. I understand, but that was the path that you would take to go to Oswego.

A. Well, yes.

Q. Now, why was it, Mr. Emmett, that you

took that path instead of taking the one that went to Wilsonia?

A. Well, we was on that path, and we would have had to go around back to the foundry to get on the other one, when we was on that one.

Q. In starting out from the barn, I understand you to say there are two ways to get to the track. One is to go to Wilsonia by one path?

A. Yes.

Q. And one to Oswego by another path?

A. Yes, sir.

Q. And you took the path that led to Oswego?

A. Yes, sir.

Q. Well, now, why did you take that path instead of the Wilsonia path?

A. Well, we would have had to went around down to the foundry, and didn't think about it at the time.

Q. Isn't this true, Mr. Emmett, that you both thought that you would go to Oswego and get on the train there?

A. Well, when we got up to the track?

Q. I mean when you left the barn.

A. When we left the barn.

Q. That was your idea?

A. That was the idea, yes, sir.

Q. To go to Oswego?

A. Yes, sir.

Q. Because you knew he had a return ticket from Oswego?

A. Yes, sir.

Q. Were you coming back to Portland?

A. I was coming to Portland, yes, sir.

Q. You hadn't gone out with him?

A. No, sir.

Q. You expected to go to Oswego and buy your ticket, and come in with him?

A. No, sir, they don't stay open.

Q. Well, you expected to get on the train at that point, at Oswego, when you left the barn?

A. When we left the barn.

Q. Now, when was it that you and Mr. Evans changed your mind and concluded to go to Wilsonia instead of to Oswego?

A. When we got up pretty near to the railroad track, going up that little bridge.

Q. When you got almost up to the railroad track, why, you say you had heard it switching, hadn't you?

A. Yes, sir.

Q. And you knew when it was switching that it was down towards Wilsonia, didn't you?

A. Yes, sir.

Q. And so did Mr. Evans know it? You talked about it, didn't you?

A. Yes.

Q. And when you got up pretty nearly to the track, you looked, and you saw the side lights in the coach?

A. No, sir, there was no side lights.

Q. You didn't see any lights at all?

A. No, sir.

Q. Mr. Evans said that he saw the side lights from the time he left the barn.

A. Well, there was lights in the window. There's no lights on the side.

Q. Well, I mean in the window.

A. Oh, in the window.

Q. That is what I mean by side lights. You saw there were side lights, or windows in the coach, and that there was light inside, didn't you?

A. Yes, sir.

Q. And you saw that from the time you left the barn?

A. Couldn't see it all the time. Never looked all the time.

Q. But you did see it before you went down onto the track?

A. Before we went onto the track?

Q. Yes.

A. I don't know as we did.

Q. You had heard it switching?

A. We heard the switching.

Q. You knew it was switching down at Wilsonia, didn't you?

A. Yes.

Q. Didn't you think where the train was going?

A. Well, switching down there a person would naturally think it was going to leave from there when it got switched.

Q. Now then, as a matter of fact, both you and Mr. Evans expected, after you got up there and saw that the train was down towards Wilsonia,

that you would have to run to catch it there, didn't you?

A. We expected we would have to run and get on it when it left Wilsonia.

Q. You thought that the train had left Oswego and was on its way to Portland, didn't you?

A. Well, I knew it was there.

Q. Well now, isn't it true that you both thought the train had left Oswego and gone to Portland—started on to Portland?

MR. LATOURETTE: We object to what Mr. Evans thought, unless Mr. Evans stated to him what his opinion was.

COURT: The two were together.

Q. Wasn't that the reason why you changed your course and didn't go up to Oswego, as you intended originally, and concluded to go the other way to Wilsonia, because you thought, both of you, that it had started on to Portland; had already been to Oswego, and was going back? Now, isn't that the fact?

A. What would be the difference if we got on at Oswego?

Q. Answer the question. Isn't that the fact?

A. We expected to get on there when it left Wilsonia, of course.

Q. I know, but you intended originally to go to Oswego; but when you got up there you saw it was down at the other place, and you thought it was going to go on; it had been to Oswego, you thought, and you wanted to catch it, didn't you?

A. Of course we wanted to catch it.

Q. Didn't you start to run to catch that train?

A. We had been running. He was ahead of me. He was a better runner than I was.

Q. You had heard it switching at Wilsonia before you got in sight of it?

A. Yes, sir.

Q. You supposed it had been at Oswego, and you would have to hurry to catch it?

A. We had to hurry, yes.

Q. You intended to catch the train? You thought it had already started?

A. It hadn't coupled up yet when we started to run down the track.

Q. Well now, when you saw the train, saw the side lights, and you were up on top there, and was going to step down onto the track, do you want to tell this jury that you walked there deliberately, with no idea of any hurry; that the train would wait for you, and that you would get on at Wilsonia; but didn't you hurry to get the train?

A. We hurried all we could, yes, sir.

Q. Didn't Mr. Evans hurry all he could?

A. I suppose he did.

Q. Didn't he outrun you, and wasn't he about 10 or 15 feet ahead of you when he was struck?

A. He was eight or ten feet ahead of me, yes, sir.

Q. You were both running at the time?

A. I don't know as he was running so fast. He was doing all he could to get there.

Q. And he was running?

A. I don't know as he was running.

Q. Weren't you running?

A. I was doing all I could.

Q. What was that? Running or walking?

A. You could call it running or trotting.

Q. I am not calling it. Was it running or what?

A. It was trotting as fast as a man could when he was out of wind.

Q. You had hurried from the time you first got up on top there, you hurried as fast as you could in the condition you both were, to get that train, supposing it was making its way to Portland?

A. Yes, sir.

Q. And you had no idea that it was going back to Oswego?

A. If I did, I wouldn't have went down there.

Q. Certainly. And neither one of you looked to see whether it was going to back?

A. Well—

Q. Now, isn't that true?

A. I wasn't watching the train. I was getting down there.

Q. Yes, you were not watching the train—you were trying to catch it?

A. I was trying to get down there, yes.

Q. How far was it from you when you got down on that track and started to run or trot down

towards Wilsonia, between the rails—was it down to Wilsonia?

A. How far?

Q. Yes.

A. Oh, about 800 feet, eight or nine hundred feet.

Q. And you intended to run all the way between the rails down to Wilsonia, 800 feet, to catch that train, did you?

A. Well, if we had time to run before it coupled up.

Q. And while you were running, all at once it came the other way?

A. Yes, sir.

Q. And caught this man. Now, didn't you know that that train was down there all the time, both of you?

A. I don't know about him knowing it. I knew it was there.

Q. You could see it when you got onto the track, couldn't you?

A. I never seen it. I knew it was there. I knew it hadn't gone.

Q. Well, did you look to see if it was there?

A. A man going that way wouldn't naturally.

Q. Couldn't you see the lights that were in that coach, through the glass door in the rear?

A. You could see the lights, yes.

Q. Couldn't you see the reflection from the side lights, it being a rather dark night?

A. I didn't notice it.

Q. But you could see it was lighted up to one side. Couldn't you see the reflection of the headlight from the engine?

A. No, sir.

Q. You didn't look to see whether it reflected at all or not, did you?

A. Well, a man looking down the track would naturally be looking.

Transcript, 89 to 92.

Q. Now, at the time you saw the train, when you got up there, you thought the train was just pulling out, didn't you, for Portland.

A. I thought it would, yes, sir.

Q. You thought it was just pulling out, and that is the reason you were hurrying?

A. It hadn't started yes, I didn't think.

Q. But you expected you would have to run to catch it?

A. To catch it.

Q. How far did you move from where you first got onto the track, or how far did Evans move from where he first got onto the track, between the rails, until he was struck, in feet? About how far down the track had you gone?

A. About how far down the track?

Q. Yes.

A. Not over 200 feet.

Q. Had you trotted all the way those 200 feet?

A. I had.

Q. You had?

A. Yes, sir.

Q. And you didn't catch him?

A. I was just a little ways behind him.

Q. He kept ahead of you about 10 feet?

A. About 10 feet.

Q. Did you notice the train backing up at all before he was struck?

A. Not until he was struck.

Q. Just before he was struck you noticed the train was coming?

A. Just about the time it struck him.

Q. How far away from you was it when you first saw the train approaching?

A. About 10 feet.

Q. You mean you were 10 feet from the rear end?

A. From the rear end.

Q. Don't you think you were 20 or 25 feet away?

A. I don't think it was.

Q. Are you certain about that?

A. I know I was not so very far.

Q. Well, weren't you as much as 20 or 25 feet away when you first saw the train coming? I mean, knew it was coming?

A. No, sir, I don't think I was.

Q. Did you call to him to get out of the way?

A. Just about the time it struck him, I called to him.

Q. What did you say?

A. I says: "Look out."

Q. Whom did you speak to?

A. Tom Evans.

Q. What did you call him?

A. I says: "Look out, Tom."

Q. Did you yell?

A. I hallooed just about as I said it.

Q. You said, "Look out, Tom."

A. Yes, sir.

Q. Did you say it that way?

A. I suppose I did.

Q. You thought he was going to be run over, didn't you?

A. Just as the door opened there when I saw it was coming.

Q. When you called to him, you thought he was going to be run over anyway, didn't you?

A. Sure, or I wouldn't have hallooed.

Q. Then you said: "Look out, Tom?"

A. Yes.

Q. That is the way you said it? Now, didn't you shout to Evans and say: "Look out?"

A. I told him to look out.

Q. And just as you shouted the man appeared at the door?

A. Yes, sir.

Q. With a lantern?

A. And we both hallooed at about the same time?

Q. That is the man on the car yelled about the same time that you did?

A. Yes, sir.

Q. And notwithstanding that, he was struck. That is all.

L. D. KEYZER, defendant's witness, on direct examination testified as follows:

Transcript, pages 321 to 324.

Q. I wish you would explain now, in your own way, tell this jury how you came into Wilsonia, what you did up to the time of the accident, explaining fully without my asking you further questions, if you can.

A. We arrived at Wilsonia on time, about 10:34. On account of the company changing the line at Oswego—which is called the Willsburg cut-off—it was necessary to drop the coaches at Wilsonia and shove them up to the depot at Oswego, because we could not make the switch at Oswego, as we did heretofore. We made the drop at Wilsonia, and we backed the train over the trestle at Wilsonia, and the brakeman rode the rear end back over the trestle, and then came up forward and cut the hose. There is two hose—the air hose and signal hose, and you have got to turn four anglecocks to do it. While he was backing up and working that hose, I worked the switch this way, to be at work properly, because it is always customary to work the switch before you make the fly, because if you don't you are liable to ditch the cars. There may be a gravel between, and if there is you cannot throw it, so it is customary to work the switch before. So the brakeman hallooed, and I gave him a lantern to come away. We dropped the cars

something like 20 feet into the clear. I threw the switch up for the main line, give the engineer the signal to back up, we headed in on the coaches. I rode the pilot in. Coupled up the train. Before they coupled up, I dropped off the pilot, jumped upon the steps of the rear coach, and went through the train to the front platform. When he coupled up, and the air released, the brakeman gave a signal to come ahead. Of course, I could not see what he was doing—I was up ahead. We went ahead, I should judge, between four and five car-lengths, as near as I could estimate the distance. And in the shadow of the darkness I saw two men coming down the track, and they were running, and I called to them to look out for the cars, the train is backing up. And one of the men got off the track, and as he did, he spoke to his partner,—I didn't know who they were at that time—to get off the track; and his partner used some profane language, something like saying he would catch them anyway. But I saw he was not going to get off the track, and I reached up and stepped on the threshold of the door—I had to reach the cord; it is about four inches higher than the platform, the threshold is, and it makes it easier to reach the cord. So I stepped on the floor and stepped on the threshold, and gave two jerks. That means to stop at once. It blows a little whistle in the engine. And just before we stopped we caught this Mr. Evans right in the face, right here, struck him on the face with the corner of the car, and he did

fall down outside, over the rail, and one pair of wheels went over his leg, because I could feel the jar of the cars as it went over. And I says to myself, "We have got somebody's leg." And we stopped in about 30 feet, I judge 30 or 40 feet. And we got out as quick as we could. He was down in the brush. He jumped, of course, on account of the pain, he jumped like a chicken with his head off. We jumped down and picked him up. The fireman came down there and Mr. Emmett was there. Somebody suggested a rope, so he would not bleed to death. Mr. Craw went into the engine and got a rope. We tied his leg up as tight as we could, and brought him into the coach. After backing up so the platform would be right opposite where Mr. Evans lay, we carried him in there, and in there I asked him what was the reason he was running—was somebody chasing after him? I supposed somebody was chasing him, because I couldn't understand why they were running down the track that way, at such a speed. And he says, "We were trying to catch the train at Wilsonia, supposing it was going to leave from there." And I think I asked him if anybody informed him that the trains did not come back to Oswego any more. I says, "Who do you blame for this?" He says, "I don't blame anybody but myself." He says, "It is my own damn carelessness. Some more of my bad luck." But he used profane language in there.

F. S. CRAW, defendant's witness, on direct examination testified as follows:

Transcript, pages 291 to 292.

Q. Now, did you have or hear any conversation with Mr. Evans, when you first went down there or at any time after the accident, as to how it happened, or as to who was to blame?

A. I was there only a short time, perhaps less than two minutes. He was talking when I came in hearing, and I overheard a conversation something like that, in substance: "This has been an expensive trip for me here tonight. But," he says, "it is my own damn carelessness, and you boys ain't to blame."

Q. Now, who was present at the time you heard that conversation?

A. I know the fireman was there, and the conductor and the brakeman. They both had lights.

Q. Do you remember whether there was any one else there or not, any bystander or outsider, at the time of this conversation?

A. There were other parties there, but I don't know who, in the dark; I don't know.

Q. I will ask you if that was said while they were tying his limb or before?

A. While they was tying his limb.

J. M. COON, defendant's witness, on direct examination testified as follows:

Transcript, pages 311 to 312.

Q. Now, do you recall this young man Evans

being in the coach when you boarded the train, and entered the car at Oswego.

A. I think when I first saw him he was on the back platform of the rear coach. I don't think they had carried him into the coach yet. They had put him on there and brought him out to Oswego, and they waited there for a cot or something to put him on and bring him to town; and they put him on after he got there. But I wouldn't be sure whether he was in the coach or just on the platform when they got there.

Q. I want you to tell the jury what conversation, if any, you heard him—what you heard him say, in the presence of yourself, and I think the Conductor, Mr. Keyzer, or any one else, when you went into that coach on that evening, as you were starting to go on to Portland.

A. Well, I think the conversation he had with Mr. Keyzer was before we started to go to Portland, and while we was in Oswego, as near as I can remember.

Q. Who was Mr. Keyzer?

A. Mr. Keyzer was the conductor.

Q. Now, then, just state to the jury who was present at that conversation, and what was said.

A. Well, I couldn't tell who all was present, but I think the engineer and the fireman were there, and the conductor, and I don't know whether the brakeman was there or not; but there was people around there—I don't know all. But Mr. Keyzer was asking him questions about where he

was, where he lived, and about him, and if he blamed the trainmen. And he said, No, it was his own damn fault; he had no business running after the car. That is what I think, just the expression he used.

While it is true that where the facts, or the fair inferences to be drawn from the same, with respect to contributory negligence are doubtful, the case is one for the jury, there is a well recognized rule in the federal courts that when from the testimony it is clear and convincing that no two minds can differ as to contributory negligence of the plaintiff, the court, in the exercise of a sound judicial discretion, may direct the jury to return a verdict for the defendant. In fact it is its duty to do so. This rule is clearly stated by the authorities under point 6.

In the case of Northern Pacific Railway Company v. Jones, 144 Fed. 47, this court discussing this exception, and speaking through Judge Gilbert, at page 52 said:

“Where the facts, or the fair inferences to be drawn from the facts, with respect to contributory negligence are doubtful, the case is one for the jury; but where, from any proper view of the undisputed or established facts, the conclusion follows as a matter of law that the plaintiff cannot recover, it is the duty of the trial court to direct a verdict. Schofield v. Chicago & St. P. Ry. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Delaware, etc.

Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Warner v. B. & O. R. R., 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; Northern Pacific Railroad v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; District of Columbia v. Moulton, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237.”

This was a case of a licensee walking on the track between stations, and this case was later followed and affirmed in the case of Russell v. Oregon Short Line R. Co., 155 Fed. 22, where this court, speaking through Judge Hunt, at pages 25 and 26, said:

“It is unnecessary to discuss the rule dwelt upon by counsel that ordinarily questions of negligence are for consideration by the jury, guided by proper instructions by the court as to the principles of law by which the jury should be controlled. That rule is so firmly established that it may be regarded as elementary. But it is also thoroughly well settled that a case may be withdrawn from the jury altogether and a verdict directed for plaintiff or defendant, as may be proper, where there is no dispute in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set aside a verdict rendered in opposition to such evidence. Delaware, etc. Railroad v. Converse, 139 U. S. 472, 11 Sup. Ct. 569, 35 L. Ed. 213. In Schofield v. Chicago & St. Paul Railway Company, 114 U. S. 615, 5 Sup. Ct. 1125, 29

L. Ed. 224, Justice Blatchford, pronouncing the unanimous opinion of the Supreme Court, said:

“It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co. v. Munson*, 14 Wall, 442, 20 L. Ed. 867; *Pleasants v. Fant*, 22 Wall, 116, 22 L. Ed. 780; *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *Baylis v. Travelers' Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989.’ ”

This was a case of an employe and others driving a hand-car along the track towards an approaching train.

It will be noted that the cases cited in plaintiff's brief do not contradict this rule. In fact they affirm it. It is also well settled that the federal courts will not follow the “scintilla of evidence” doctrine as laid down by some state courts. The case of *Rich v. Chicago, etc. Ry. Co.*, 149 Fed. 79-83, quoted above, is determinative of this point. See also *Hart v. Northern Pacific Railway Co.*, 196

Fed. 180, 187, where the case of *Improvement Co. v. Munson*, 14 Wall. 442, 448, disapproving this "scintilla of evidence" doctrine, is approved and followed. At page 187, the court for the Eighth Circuit, speaking through Judge Adams, said:

"In the early case of *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867, that court distinctly disapproved of the 'scintilla doctrine', saying:

" 'But the recent decisions of high authority have established a more reasonable rule (than the scintilla rule) that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'

"In *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958, *Delaware, etc. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, *Elliott v. Chicago, Milwaukee & St. Paul Ry.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court affirmed the doctrine of the *Munson Case*, but no criterion was suggested for determining what evidence was of such 'conclusive character' as to warrant the summary action of the court in directing a verdict."

Not only have the various federal appellate courts and district courts adhered to and followed the ruling laid down in the *Jones case*, but the

United States Supreme Court has in numerous decisions laid down and adopted the rule that when the evidence given at the trial, with all the inferences which the jury could justly draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court in the exercise of a sound judicial discretion is not bound to submit the case to the jury, but may direct a verdict for the defendant. The cases quoted under point 6 fully support this rule, and it is sufficient to refer to the case of *Elliott v. Chicago, etc. Ry. Co.*, 150 U. S. 245, where the court, speaking through Mr. Justice Brewer, at page 246, said:

“It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, Milwaukee & St. Paul Railroad*, 114 U. S. 615; *Delaware, Lackawanna &c. Railroad Co. v. Converse*, 139 U. S. 469; *Aerkfetz v. Humphreys*, 145 U. S. 418.”

Plaintiff knew the train was at Wilsonia. He had heard it switching and saw the side lights. He took a *convenient* way to catch the train which he imagined was pulling out for Portland. Without stopping to investigate the actual situation, and

assuming it was pulling out towards Portland, he rushed to defendant's right of way and then down between the rails three hundred and fifty or three hundred and seventy feet, without stopping once or paying any attention, being engrossed in "just hitting it along" to catch the train. It is inconceivable how one who was exercising any care at all, could have failed to hear or to see the train backing towards him. Under the record in this case there can be no dispute as to plaintiff's contributory negligence under any view that is taken of the testimony. Two persons could not reach a different conclusion, and a verdict returned by a jury against the defendant, under the testimony in this case, would clearly have to be set aside by the trial court. The only conflict of testimony, if it can be called a conflict, arose when plaintiff said he was looking ahead.

The case of *Hart v. Northern Pacific Ry. Co.*, 196 Fed. 180, is instructive on the question of what constitutes a substantial conflict of testimony to send a case to the jury, and with the case of *Northern Pacific Co. v. Jones*, 144 Fed. 47, is determinative of the question of plaintiff's contributive negligence as a matter of law.

At page 186 of the *Hart* case, Judge Adams speaking for the Eighth Circuit, said:

"So much for affirmative evidence of want of ordinary care. But there was more than this. The physical and uncontradicted facts are to

the same effect. He could not have looked or listened or otherwise made any use of his senses to discover the approach of the train behind him. If he had done so at any time after the train started from the Jamestown depot, he could not have avoided seeing or hearing it. It is inconceivable that he could have paid any attention to it as it approached nearer and nearer to him. If he had done so, he must have both seen and heard it. If, after seeing and hearing its close approach, he made no effort to avoid being run over by it, he certainly was not in the exercise of ordinary care. But we are here met with the contention that the steam which witness Dell testified about so obscured his view that, if he had looked, he could not have seen the approaching engine. Nine witnesses, including four whose credibility plaintiff vouches for, by calling them, and five others who were experienced in such matters and who stood at the time of the accident on the open platform of the yard office or just east of it, all testified that there was no cloud of steam or anything else which interfered with their perfect vision eastwardly even so far back as Jamestown depot. With this array of testimony directed to the very point and place of inquiry, the testimony of Dell who stood at the time between 300 and 400 feet west of the yard office, to the effect that some cloud of steam obscured his vision eastwardly, is not necessarily inconsistent with that of the other witnesses. One, at least, of the engines about the yards was located in a southwesterly direction from the yard office,

which, if Dell was correct in saying that the steam came from an engine blowing off, might have projected its steam across the line of his vision west of the yard office; and this would not have been inconsistent with the testimony of the other nine witnesses that there was no impediment to vision between the yard office where they stood, eastwardly to the depot at Jamestown. Whether this be so or not we do not think Dell's evidence creates such a substantial conflict with that of the other nine witnesses as warranted a submission of the issue of contributory negligence to the jury.

"In *Southern Pacific Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485, the Supreme Court, in passing upon a similar question to that now before us, said:

" 'There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law.'

"The Supreme Court had before that time in repeated cases held that the court might withdraw a case from the jury and direct a verdict for the plaintiff or the defendant where the evidence was undisputed, 'or of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

"In the early case of *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867,

that court distinctly disapproved of the "scintilla doctrine," saying:

" 'But the recent decisions of high authority have established a more reasonable rule (than the scintilla rule) that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'

"In *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958, *Delaware, etc. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, *Elliott v. Chicago, Milwaukee & St. Paul Ry.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court reaffirmed the doctrine of the *Munson Case*, but no criterion was suggested for determining what evidence was of such 'conclusive character' as to warrant the summary action of the court in directing a verdict. In view of that fact the *Pool Case* becomes peculiarly instructive. It is there said: Where the facts are 'undisputed or clearly preponderant' the question of negligence becomes one of law. We have heretofore in the cases of *Chicago & N. W. Ry. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65, *Pattillo v. Allen-West Commission Co.*, 65 C. C. A. 508, 131 Fed. 680, 686, followed the doctrine of the *Pool Case*, and held that under circumstances like those of the present case it was the duty of the trial court to treat the question involved as one of law and

not of fact. See to the same effect the very recent case of Chicago Junction Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. —, decided December 11, 1911, and also Mt. Adams etc. Inclined Ry. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463.

“Dell’s testimony, therefore, to the effect that his vision 300 or 400 feet west of the yard office when looking in the direction of the Jamestown depot was obscured by steam, constitutes no substantial contradiction to the testimony of the nine other witnesses that their vision at or east of the yard office was not obscured at all.”

See also 23 Am. & Eng. Ann. Cases 1912-B, foot note page 1133.

It is respectfully submitted that the testimony in this case shows conclusively that plaintiff was guilty of contributory negligence as a matter of law, in rushing carelessly down the track between the rails and into a train which he knew was at Wilsonia, and that the same comes clearly within the exception recognized by the authorities, and that under the doctrine laid down by this court in the Jones, Russell and Morgan cases, the trial court did not err in directing a verdict for the defendant, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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